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83-1217

NO.

in the Supreme Court of the United States

OCTOBER TERM, 1983

V. WILLIAM DI BUONO, Assignment Judge, et als., Petitioners

vs.

WILLIAM H. FAUVER, Commissioner, Department of Corrections, State of New Jersey

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

1. Whether constitutional rights of inmates and jail staff at a County Jail and constitutional rights of the citizens of the County who, through government officials operate the Jail, are violated by double celling inmates in combined cell and adjacent corridor space which measures, at most, 40 square feet of space per inmate for virtually 24 hours a day.

2. Whether the remedy fashioned by the District Court in ordering the State Commissioner of Corrections to remove all State Prison sentenced inmates from the County Jail and place them in the more spacious State facilities in order to maintain a manageable population limit at the County Jail was a proper exercise of the Federal Court's power.

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NO.

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vs.

WILLIAM H. FAUVER, Commissioner, Department of Corrections, State of New Jersey

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

Robert C. Doherty, County Counsel of the County of Union and a member of the Bar of this Honorable Court, on behalf of **V. William Di Buono, Assignment Judge**, et als. (hereinafter County Defendants), the petitioners herein, pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Third Circuit entered in the above-entitled case on August 11, 1983.

OPINIONS BELOW

The August 11, 1983 opinion of the Court of Appeals, whose judgment is herein sought to be reviewed, is reported at 713 F. 2d 984 (C.A. 3-1983) and is reprinted in the separate Appendix to this Petition. (App. 2). The prior opinion of the United States District Court for this District of New Jersey, also reprinted in the Appendix (App. 42), is reported at 537 F. Supp. 993 (D.N.J.-1982).

JURISDICTION

The judgment of the Court of Appeals for the Third Circuit was entered on August 11, 1983. (App. 40). A timely petition for rehearing **en banc** was denied on October 5, 1983 by a 6-4 vote with three Judges joining in an opinion dissenting from denial of rehearing. (App. 79). The jurisdiction of the Supreme Court is invoked pursuant to 28 U.S.C. §1254 (1).

CONSTITUTIONAL PROVISIONS INVOLVED

The Fifth Amendment to the Constitution of the United States provides in pertinent part as follows:

> "nor shall (any person) be deprived of ... liberty ... without due process of law ..."

The Eighth Amendment to the Constitution of the United States provides in pertinent part as follows:

> "cruel and unusual punishments (shall not be) inflicted."

The Ninth Amendment to the Constitution of the United States provides that:

> "The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people."

The Fourteenth Amendment to the Constitution of the United States provides that:

> "Nor shall any State deprive any person of ... liberty ... without due process of law."

STATEMENT OF THE CASE

This is a class action brought by inmates, both pre-trial detainees and sentenced prisoners, of the Union County Jail in Elizabeth, New Jersey, alleging that the totality of the conditions at the Jail due to severe overcrowding violated the constitutional rights of the inmates in both classes. The inmates sought declaratory and injunctive relief from the U.S. District Court for the District of New Jersey and their Complaint was brought pursuant to 42 U.S.C. §1983; U.S.C. §1343 (3) and (4); and 28 U.S.C. §2201 and §2202.

The Jail officials (County Defendants) filed their Answer to the Complaint together with a Third Party Complaint against the New Jersey Commissioner of Corrections attributing any unconstitutional conditions at the Jail to the acts and omissions of the Commissioner. On October 22, 1981 the Plaintiffs and County Defendants entered into a Consent Judgment resolving the matter by setting a population maximum at the Jail based upon one inmate per general population cell and providing procedures for maintaining that population level. Contemporaneously therewith, the County Defendants sought and received an Order to Show Cause why the Commissioner of Corrections should not be compelled to remove all State sentenced prisoners in the County Jail in order to permit the County to comply with the Consent Judgment.

The District Court appointed a Special Master who conducted investigatory tours of the facility and hearings attended by the parties. He ultimately recommended a finding of unconstitutional conditions at the Jail and proposed as a remedy the continued removal by the State Commissioner of Corrections of all State sentenced inmates from the County Jail. The District Court accepted the Report and rendered its opinion and order adopting the remedy suggested and declining to accept the arguments raised by the Commis-

sioner to provide double celling at the Jail rather than ordering the removal of the State sentenced inmates which, in effect, prohibited double celling at the Jail in the general population cells.

The Court of Appeals reversed (App. 2). A petition for rehearing **en banc** was denied with a strong dissent by four judges, three of whom joined in the dissenting opinion (App. 82-109). Judge Gibbons, in the dissent, noted that the holding of the majority is in conflict with other Circuit decisions and that

> "by disregarding the Master's findings, and fragmenting the case as if it did not involve an interrelated set of interolerable conditions, all resulting from overcrowding, the panel opinion has applied bits and pieces of language in *Bell v. Wolfish*, 441 U.S. 520 (1979) in a manner the Supreme Court never intended." (App. 79).

Further, Judge Gibbons noted that

> "The minimum standards announced in the panel opinion for conditions of pre-trial detention and post conviction confinement in this Circuit are more severe than any that have been tolerated in any other locality in the United States." (App. 82).

REASONS FOR GRANTING THE WRIT

ISSUE I: THE DECISION BELOW CONFLICTS WITH DECISIONS OF THIS COURT CONCERNING INMATE RIGHTS SECURED UNDER THE FIFTH, EIGHTH AND FOURTEENTH AMENDMENTS.

A. **Pre-Trial Detainees**

The Court of Appeals misapplied the guidelines set by *Bell v. Wolfish*, 441 U.S. 520 (1979) concerning the conditions of confinement for pre-trial detainees in a County Jail facility. The Court merely viewed *one* of the conditions found unconstitutional, viz., placing a mattress on the floor of a general population cell, and found *de novo* that by adopting the Commissioner's recommendation of a double bunk, this condition would be removed.

The Court of Appeals, however, neglected to consider the *totality* of conditions found by the Special Master. These included, along with the mattresses on the floor: 1) absence of recreation; 2) reduction in visitation; 3) delays in administering programs; 4) inadequate lighting; 5) inability to provide clean clothing daily; 6) absence of medical screening – all caused by the overcrowding and *population level of the Jail*. As noted by Judge Gibbons in his dissenting opinion to the Denial for Rehearing, the double celling will only *exacerbate* the problem by increasing dramatically the population level at the Jail (App. 105-106).

In sum, the panel decision has embarked on an independent method of Due Process inquiry on inmate rights for the Third Circuit. It as chosen to select *one* item found below to be unconstitutional, addresses a remedy to it alone, and ignores that practical ramifications of that remedy to all the other factors in a totality context by the Special Master and the District Court. Such an action is unique, it is submitted, and in direct conflict with the string of decisions applying *Bell v. Wolfish, supra* which are as follows: *Lareau v. Manson*,

651 F. 2d 96 (2d Cir. 1981); *Lock v. Jenkins*, 641 F. 2d 488 (7th Cir. 1981); *Jones v. Diamond*, 636 F. 2d 1364 (5th Cir.) (en banc), *cert. dism.* sub. nom. *Ledbetter v. Jones*, 453 U.S. 950 (1981); *Campbell v. Cauthron*, 653 F. 2d 503 (8th Cir. 1980); *Fischer v. Winter*, 564 F. Supp. 281 (N.D. Cal. 1983); *Martino v. Carey*, 563 F. Supp. 984 (D. Or. 1983); *Campbell v. McGruder*, 554 F. Supp. 562 (D. D.C. 1982), *Campbell v. McGruder*, 554 F. Supp. 562 (D. D.C. 1982), *on remand from* 580 F. 2d 521 (D.C. Cir. 1978); *McMurry v. Phelps*, 533 F. Supp. 742 (W.D. La. 1982); *Gross v. Tazewell County Jail*, 533 F. Supp. 413 (W.D. Va. 1982); *Vasquez v. Gray*, 523 F. Supp. 1359 (S.D. N.Y. 1981); *Hutchings v. Corum*, 501 F. Supp. 1276 (W.D. Mo. 1980); *Benjamin v. Malcolm*, 495 F. Supp. 1357 (S.D.N.Y. 1980).

B. **Sentenced Inmates**

The same conditions heretofore outlined at the Union County Jail for pre-trial detainees also apply to sentenced inmates. *Rhodes v. Chapman*, 452 U.S. 337 (1981). For the same reasons as set forth above the Court of Appeals failed to follow the established guidelines of the Supreme Court. In determining the Eighth Amendment consequences of jail conditions:

> "No static test can exist by which courts determine whether conditions of confinement are civil and unusual, for the Eighth Amendment must draw its meaning from the evolving standards of decency that mark the progress of a maturing society." 452 U.S. at 346.

In criticizing the District Court's analysis of Eighth Amendment considerations which led to the conclusion said Amendment was violated, the Court of Appeals inexplicably stated that the Court

> "failed to consider the totality of circumstances relevant to determining whether

> conditions have fallen to the level at which the shelter of inmates is unfit for human habitation.."

(App. 32).

Again, we must refer to Judge Gibbons vigorous dissent and in determining what the Supreme Court meant by the phrase "evolving standards of decency that mark the progress of a maturing society" we must compare the Federal Standards under the Animal Welfare Act for non-human primates (App. 82-83).

Further, the Court of Appeals again merely considered the *one* aspect found unconstitutional — the mattress on the floor — and failed to consider the *practical* ramifications that would be caused by the increased population level attributable to double bunking.

REASONS FOR GRANTING THE WRIT

ISSUE II: CONSTITUTIONAL RIGHTS OF THE PEOPLE OF THE COUNTY OF UNION AND THEIR EMPLOYEES PROTECTED UNDER THE NINTH AMENDMENT WILL BE VIOLATED IF THE DECISION APPEALED FROM IS ALLOWED TO STAND

While this writer readily admits the paucity of precedent or of any cases similar to this latter point it is a point which we honestly feel should be thoroughly developed by legal research and briefs outside of the time constraints necessarily imposed on a petition for certiorari.

It is respectfully urged that there is a fundamental right of the citizens of a County, the "people" sovereign and supreme under our form of government, to be safe and secure in their homes. (Indeed the Fourth Amendment enumerates a specific right in the context of search and seizure.) We urge here, however, the concept of penumbral guarantees to establish these rights which would, in part, affect the above-referenced Fourth Amendment and the Fourteenth Amendment wherein equal protection of the laws is provided.

The point to be developed is that the people of the County have a right to have a safe and secure jail, and one that meets constitutional standards. In part, this would protect the people and their employees from any physical harm or damage caused by a riot, such as previously occurred during the pendency of this litigation, and resulting escape into the streets of dangerous persons; in other part, the people have a right to be secure from the unnecessary *financial* damage that could be visited upon them by virture of maintaining an unconstitutional jail pursuant to such statutes as 42 U.S.C. 1983 et seq.

The concept of penumbral guarantees is not new and has found its most famous expression in *Griswold v. Connecticut*, 381 U.S. 479 (1965). While generally the concept is raised in cases dealing with a right to privacy we would like to develop the point that it can likewise extend to other, perhaps more novel, fundamental rights as well.

In addition, the people of the County have the right to expect and provide safe working conditions for their jail staff. An environment that packs human beings into space unfit, by Federal Standards, for non-human primates, can only cause tensions and frustrations to rise in the inmates which can lead to clear and continous danger to jail personnel and threats to their safety.

REASONS FOR GRANTING THE WRIT

ISSUE III: THE COURT OF APPEALS ERRED BY EXCEEDING THE APPROPRIATE SCOPE OF APPELLATE REVIEW AND ABROGATING THE BROAD DISCRETION OF THE DISTRICT COURT TO FASHION A PROPER REMEDY.

The Supreme Court has clearly stated that "Appellate Courts must constantly have in mind that their function is not to decide factual issues *de novo.*" *Zenith Radio Corp. v. Hazeltine Research Inc.*, 395 U.S. 100, 123 (1969). Further, Fed. R. Civ. P. 53 (e) (2) provides that the findings of fact by a Special Master *shall* be accepted unless *clearly erroneous*. *Anderson v. Mt. Clemens Pottery Co.*, 328 U.S. 680, 689 (1946).

The arguments raised by the Commissioner in his appeal dealt with the very matters considered by the Special Master, *and rejected by him* as well as rejected by the District Court. The Court of Appeals, however, *de novo* found as a fact that the Special Master's recommendations were wrong and the Commissioner's remedial scheme (double bunking) was preferable.

It is respectfully submitted that such action was an impermissable *de novo* fact finding mission by the Court of Appeals panel.

A District Court has wide discretion in fashioning a remedy, once a right and violation thereof have been shown. *Swann v. Charlotte-Mecklenburg Board of Education*, 402 U.S. 1, 15 (1971). In *Lemon v. Kurtzman*, 411 U.S. 192, 200 (1973) this Court held that when "shaping equity decrees, the trial Court is vested with broad discretionary power; appellate review is correspondingly narrow".

The scope of the remedy fashioned by the District Court was directly related to the nature of the violation. The *direct cause* of the violation was the *number* of inmates housed in the facility, and *not* the method in which they were housed. The *effects* of the large population being housed were the conditions complained of, viz. sleeping arrangements, recreation, visitation, clothing, services and the like.

The cause of the large population, as found by the Special Master, was the refusal by the Commissioner of Corrections to remove from the County Jail the State sentenced inmates.

Thus, by ordering the removal of the State sentenced inmates, the District Court fashioned a remedy uniquely suited to the direct cause of the violation. By so doing, the District Court acted within the parameters of reasonable discretion. Conversely, by conducting a *de novo* consideration of the facts and ordering an alternate remedy, the Circuit panel exceeded the proper scope of Appellate review.

CONCLUSION

For the foregoing reasons, as well as any additional reasons presented by other parties who may seek certiorari to review the decision of the Third Circuit, the petition for certiorari should be granted.

Respectfully submitted,

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Appendix

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UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 82-5310

UNION COUNTY JAIL INMATES, TIMMIE LEE BARLOW, ELBERT EVANS, JR., RAYMOND SKINNER, JAMES WYSOCKI, on behalf of themselves and all other persons similarly situated

v.

V. WILLIAM DI BUONO, Assignment Judge; JOSEPH G. BARBIERI, Criminal Assignment Judge; CUDDIE E. DAVIDSON, JR., Bail Judge; as Representatives of the Judges of the Criminal Courts of Union County; RALPH FROELICH, Union County Sheriff; JAMES SCANLON, Jail Administrator; THOMAS HEFFERSON, Jail Warden; ROSE MARIE SINNOT, Chairman, Board of Chosen Freeholders; GEORGE ALBANESE, County Manager; and their Successors in Office, in their official capacities, Randolph Pisane and Louis J. Coletti

v.

WILLIAM H. FAUVER, Commissioner, Department of Corrections, State of New Jersey, and his Successor in his official capacity

William H. Fauver, Commissioner,
New Jersey Department of Corrections,
Appellant

On Appeal from the United States District Court
for the District of New Jersey
(Civil Action No. 81-863)

Argued December 14, 1982
Before: HUNTER and GARTH, *Circuit Judges*
and WEBER, *District Judge**

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Jail Inmates, Barlow, Evans,
Skinner, Wysocki, et al.

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*Honorable Gerald J. Weber, United States District Judge for the Western District of Pennsylvania, sitting by designation.

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OPINION OF THE COURT

GARTH, *Circuit Judge.*

I.

This case raises serious and complex questions of the constitutionality of conditions under which pre-trial detainees and sentenced inmates are confined at the Union County Jail (the Jail). All parties agree that the Jail is seriously overcrowded and dispute exists only as to whether that overcrowding and the conditions that result from it are so shocking that confinement in the Jail amounts to punishment of the pre-trial detainees in violation of the due process clause or to cruel and unusual punishment of the sentenced inmates in violation of the Eighth Amendment. The district court held that the conditions are unconstitutional for both classes of inmates and that the unconstitutionality could only be remedied if the Commissioner of the Department of Corrections of the State of New Jersey removed those inmates sentenced to state prison. We cannot agree.

II

On March 25, 1981, inmates of the Union County Jail (hereinafter inmates) filed this civil rights action under 42

U.S.C. §1983, alleging that the Jail was over-populated[1] and that the "totality of conditions" at the Jail violated the inmates' constitutional right to due process and equal protection of the laws and their right to be free from cruel and unusual punishment. The complaint sought a declaration that the conditions at the Jail were unconstitutional and an injunction ordering the County to reduce the population to constitutional levels. The complaint was brought as a class action, the class consisting of all persons who were then, or who during the pendency of the suit would become, incarcerated in the Jail. The class, certified by the district court, included pre-trial detainees[2] (inmates awaiting trial and not considered bailworthy) and inmates sentenced to terms either in the Jail or in state prison. The complaint named as defendants various judges,[3] administrators of the jail, and county officials (hereinafter known collectively as the County).

On April 3, 1981, the County filed an answer to the complaint, admitting that the inmates were held in the over-

1. The State of New Jersey is in the midst of a serious statewide prison overcrowding emergency. *See* Exec. Order No. 106 (Byrne) June 19, 1981), No. 108 (Byrne) (September 11, 1981), No. 1 (Kean) (January 20, 1982), No. 27 (Kean) (May 20, 1982), No. 43 (Kean) (July 15, 1983). As a result of New Jersey's new criminal code, 23% more incarcerative sentences were imposed in the first six months of 1981 than during the comparable period in 1980, and the length of such sentences significantly increased. Union County Jail Inmates v. Scanlon, 537 F. Supp. 993, 996 & n. 3 (D.N.J. 1982) opinion below) (hereinafter *Union County*). Consequently, prison population was projected to increase 38% from 1981 to 1982. *Id.* at 996 n. 5. The state prison system is filled to 117% of its design capacity for maximum and medium security inmates and the jail systems of the other counties in the State are also beyond design capacity. Construction of new correctional facilities has not kept pace with the demand for prison space. *Id.* at 996.

2. On February 15, 1982, 57% of the Jail population consisted of pre-trial detainees. *Union County*, 537 F. Supp. at 999.

3. The action against the various judges was later dismissed. App. 2a.

crowded conditions specified in the complaint. In a third-party complaint filed on the same day against the Commissioner of the New Jersey State Department of Corrections (the Commissioner), the County attributed any unconstitutionality of conditions at the Jail to overcrowding resulting from the refusal of the Commissioner to accept for custody those prisoners who had been sentenced to state prison. The County argued that, pursuant to N.J. Stat Ann. 2C:43-10(e) (West 1982), the Commissioner was required to remove from county facilities, within 15 days after sentencing, those inmates sentenced to terms in state correctional facilities (state prisoners). The County sought a declaration that the Commissioner's refusal to accept state prisoners was unconstitutional and sought an injunction permanently preventing him from refusing to take custody of state prisoners.

On June 19, 1981, responding to the state-wide prison overcrowding problem, Governor Byrne issued Executive Order No. 106,[4] in which he declared that overcrowded con-

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4. The provisions of Executive Order No. 106 were extended by Governor Byrne on September 11, 1981 (No. 108) and by Governor Kean on January 20, 1982 (No. 1). We take judicial notice of the fact, not a part of the record below, that Governor Kean extended the prior Executive Orders on May 20, 1982 (No. 8), on January 10, 1983 (No. 27), and on July 15, 1983 (No. 43) (extending until January 20, 1984). The New Jersey Appellate Division upheld the validity of the Executive Order on September 4, 1981. *Worthington v. Fauver*, 180 N.J. Super. 368 (App. Div. 1981). On January 6, 1982, the Supreme Court of New Jersey unanimously affirmed the judgment of the Appellate Division. *Worthington v. Fauver*, 88 N.J. 183, 440 A.2d 1128 (1982).

Executive Order No. 106 provided in relevant part:

> NOW, THEREFORE, I BRENDAN T. BYRNE, Governor of the State of New Jersey ... do hereby DECLARE a state of emergency and ORDER and DIRECT as follows:
>
> 1. I DECLARE, that a state of emergency exists in the various State and County penal and correctional facilities ...

ditions in New Jersey's State Prisons and county facilities constituted a state of emergency, and that flexibility was needed in the assignment of inmates in order to maximize

NOTE — (Continued)

2. I invoke such emergency powers as are conferred upon me by the Laws of 1942, Chapter 251 (N.J.S.A. App. A:9-30, *et seq.*) and all amendments and supplements thereto.

3. I hereby DIRECT that the authority to designate the place of confinement of all inmates confined in all State and/or County penal or correctional institutions shall be exercised for the duration of this Order by the designee of the Governor.

4. I hereby designate the Commissioner of the Department of Corrections to effectuate the provisions of this Order.

5. The Commissioner may designate as a place of confinement any available, suitable, and appropriate institution or facility, whether owned by the State, a County, or any political subdivision of this State, or any other person, for the confinement of inmates confined in the State and/or County penal or correctional institutions.

8. I further ORDER that the authority of the Commissioner to designate the place of confinement of any inmate may be exercised when deemed appropriate by the Commissioner regardless of whether said inmate has been sentenced or is being held in pretrial dentention except that only persons sentenced to a prison or committed to the custody of the Commissioner may be confined in a State Prison.

10. The Commissioner of Corrections shall develop an appropriate compensation program for the counties.

11. It shall be the duty of every person in this State, and the members of the governing body, and of each and every official, agent, or employee of every political subdivision in the State and of each member of all other governmental bodies, agencies and authorities in this State of any nature whatsoever, fully to cooperate in all matters concerning this emergency.

14. This Order shall take effect immediately (June 19, 1981).

App. 587a-89a

the use of space. The Order suspended the operation of N.J. Stat. Ann. 2C:43-10(e) (West 1982), and empowered the Commissioner of Corrections to designate the place of confinement for both state and county inmates, whether pretrial detainees or sentenced inmates. The Commissioner, exercising the discretion conferred by the Executive Order, designated the Jail as the place of confinement for state prisoners sentenced in Union County. The Commissioner determined that the Jail, with modifications of the existing structure, could accomodate a number of inmates greater than its rated capacity.

On October 22, 1981 the district court approved a consent agreement between the County and the inmates. The Commissioner was not a party to the agreement. This agreement specified a maximum population capacity of 238 for the Jail (assuming there would be one person in each general population cell) and designated a procedure whereby the County could request an immediate hearing before the district court in the event the population of the Jail approached or reached the maximum capacity specified. The agreement contemplated that the district court might, under such circumstances, order the release or transfer of enough inmates to reduce the population below the stated maximum. On that same date, the court entered an order directing the Commissioner to show cause when he should not be compelled to accept custody of all state prisoners in the Jail.

On November 10, 1981, the Commissioner filed a motion to vacate and set aside the consent judgment under Fed. R. Civ. Proc. 60(b)(1) and 60(b)(6), on the grounds that it was entered without the consent of the Commissioner, and that the consent given by the County was illegal as *ultra vires* under state law. The Commissioner contended that the County was without the authority to enter such an agreement, under the terms of Governor Byrne's Executive Orders Nos. 106 and 108.

On December 16, 1981, the district court stayed scheduled hearings on the County's order to show cause and the Commissioner's motion to vacate the consent judgment, pending the decision of the New Jersey Supreme Court in *Worthington v. Fauver*, 88 N.J. 183, 440 A.2d 1128 (1982). On January 6, 1982, the Supreme Court of New Jersey in that case unanimously held that Executive Orders Nos. 106 and 108 (Byrne) were a valid exercise of the power delegated to the Governor under the Civil Defense and Disaster Control Act, N.J. Stat. Ann. App.A:9-30 *et seq.* (West 1982), that the Orders did not violate the state constitutional doctrine of separation of powers, and that the Commissioner's actions pursuant to the orders were not arbitrary or capricious.

On December 21, 1981 the inmates made a motion to hold the County in contempt for failure to abide by the consent decree. On January 8, 1982 the County made a motion to vacate the consent judgment. The district court held a hearing on January 20, 1982 in order to consider the two motions previously stayed (the County's motion for a preliminary injunction against the Commissioner, and the Commissioner's motion to vacate the consent judgment) as well as the two new motions. The district court reasoned that if the County could comply with the consent judgment, then the necessary actions would be within the scope of the County's authorized responsibility and the Commissioner would lack standing to attack the consent order.

On January 29, 1982, the district court, pursuant to Fed. R. Civ. P. 53(b), appointed a Special Master to investigate conditions at the Jail and to assess the County's efforts under consent judgment. Pending return of the Special Master's Report within 45 days, the district court denied without prejudice the Commissioner's motion to vacate the consent order and deferred ruling on the other motions.

The Special Master filed his Report and Recommendations on March 1, 1982. Most notably, the Special Master

found that, because of overcrowding, general population cells designed for one inmate were being used to house two inmates by use of mattresses placed on the floors of these 5' x 7' cells next to the toilet. The better part of the men's exercise area and all of the women's recreation area had also been converted into temporary dormitories, in which inmates slept on mattresses placed on the floor. Altogether, with respect to the pretrial detainees, the Special Master found six specific conditions that he regarded as constitutional violations. See note 11, *infra*.[5]

With respect to the sentenced inmates, the Special Master found two conditions that he regarded as constitutional violations. The Special Master recommended that these specific violations should be cured, and that the Commissioner should be given a reasonable time to bring the population of the Jail down to the limit specified by the consent judgment. He also found that the County had made a good faith attempt to comply with the provision of the consent judgment requiring maintenance of essential and other inmate services, and that any failures on the County's part were due to the overcrowding problem.

On March 12, 1982, the Commissioner filed objections to the Special Master's Report. He argued that the Special Master should have recommended only the correction of the particular objectionable conditions, rather than the transfer of state inmates. The Commissioner noted that the practice of double-bunking inmates had not been regarded as unconstitutional *per se* by the Special Master.[6] The Commissioner argued that the County need only equip its general

5. In order to avoid unnecessary repetition of the findings, these conditions will be set forth in detail only in connection with our analysis of the district court's conclusions.

6. In a footnote the Special Master stated "I make no ruling on the feasibility or constitutionality of [equipping the general population cells with two beds] since that question was not raised in the record before me." App. 90a.

population cells with two bunk-type beds in order both to eliminate the unconstitutional practice of placing mattresses on the floor and to increase the recreational opportunities for both male and female inmates. He argued further that clean clothes could be provided to inmates at least once each week and a medical screening procedure instituted, insofar as the County already had an inmate-operated laundry on the premises and a doctor and medical staff at the jail every day. On March 25, 1982, the court held a hearing on the Commissioner's objections to the Special Master's Report.

On April 27, 1982, the court filed an opinion and order, adopting the findings of fact of the Special Master without modification. The court held that the totality of circumstances resulting from overcrowding at the Jail, and most notably forcing pre-trial detainees to sleep on mattresses placed on the floor, constituted a violation of the detainees' due process rights. The court rejected the Commissioner's contention that installation of double-bunks and other improvements could remedy these unconstitutional conditions. The court held that, based on space considerations alone, double-celling "amounted to punishment," in violation of the detainees due process rights. The court also held that requiring the sentenced inmates to sleep for extended periods on mattresses placed on the floor constituted cruel and unusual punishment. It held, in addition, that even if bunk beds were substituted for floor mattresses, the shelter provided would fail to meet "contemporary standards of decency" and thus violate the Eighth Amendment, since the sentenced inmates would have only 30 square feet of daytime space and 19.5 square feet of sleeping space.

Having concluded that the conditions in the Jail were constitutionally impermissible, the court held that, under the Supremacy Clause, the Executive Orders that had caused the overcrowding in the Jail must yield. The court declared the Commissioner's action of designating the Jail as the place of confinement for state prisoners void and ordered

the Commissioner to remove, by July 1, 1982, all state prisoners who on that date had been confined in the Jail for fifteen days or more since being sentenced to terms of imprisonment in state facilities. The order also required full compliance with N.J. Stat. Ann. 2C:43-10(e) (West 1982) thereafter.

The court also directed the County, pursuant to its duties under the consent judgment, to implement a medical screening program, to reinstate the recreation and visitation programs at prior levels, and to comply with state regulations that require it to provide inmates with clean clothing and towels.

The Commissioner appealed from the April 27, 1982 order. Neither the County nor the inmates have appealed.

III

Jurisdiction

When the district court entered its April 27, 1982 order, there were three pending motions before the court. First, the motion of the County for a preliminary injunction directing the Commissioner to remove state prisoners from the Jail; second, the motion of the inmates to hold the County in contempt of the consent judgment; and third, the motion of the County to vacate the consent judgment. The motion of the Commissioner to vacate the consent judgment, denied without prejudice in the district court's January 29, 1982 order, was apparently not renewed by the Commissioner,[7] and the district court ordered that the consent judgment be continued in full force and effect.

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7. At oral argument before this court, counsel for the Commissioner indicated that he continued to regard the consent judgment as invalid.

The district court disposed of these motions by enjoining the defendants "to reduce the population of the Union County Jail to constitutional levels." The court "declare(d) that the failure and continued refusal of the Commissioner ... to comply with the mandates of N.J.S.A. 2C:43-10(e) is unconstitutional" and "permanently enjoined the Commissioner ... from refusing to accept State prisoners from the Union County Jail in conformity with N.J.S.A. 2C:43-10(e)." *See Union County*, 537 F. Supp. at 1009, 1015. The order thus implicitly denied the motion of the inmates to hold the County in contempt of the consent judgment. Finally, the order "continue(d) in full force and effect, except as modified or supplemented," the consent judgment approved on October 22, 1981. *Union County*, 537 F. Supp. at 1015. Accordingly, the order, disposing of all claims by all parties, and leaving "nothing to be done but to enforce ... what has been determined," is "final" for purposes of 28 U.S.C. §1291. *Richerson v. Jones*, 551 F. 2d at 918, 922 (3d Cir. 1977). It is from this order that the Commissioner appeals.[8]

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8. The April 27, 1982 order, as noted, continued the consent judgment in full force and effect, and indeed amplified the provisions of that agreement. The provisions of that judgment having significance to the Commissioner were those confirming the agreed-upon "maximum capacity" for the Jail (Paragraph (f)), giving the defendants until July 1, 1982 to achieve that population figure (Paragraph (g)), and empowering the County to "notify the Department of Corrections to remove any state prisoners who have remained at the facility beyond the statutory fifteen (15) day period since sentence was imposed" (Paragraph (h)).

In his notice of appeal from the April 27, 1982 order, the Commissioner expressly noted that he was appealing from that order which, *inter alia*, "continues in full force and effect the Consent Judgment approved on October 22, 1982." It is clear from the Commissioner's original motion that the thrust of his objection to the consent judgment is that

> the sole final authority to decide, *under New Jersey state law*, what the Union County Jail inmate population capacity or

The County did not appeal from the April 27, 1982 order continuing the consent judgment in full force and effect.

IV.

Pre-trial Detainees

A.

The constitutional framework and the more particular standard governing the due process rights of pre-trial detainees were articulated by the Supreme Court in *Bell v. Wolfish*, 441 U.S. 520 (1979). In *Bell* the Court held that

> (i)n evaluating the constitutionality of conditions or restrictions of pretrial detention that implicate only the protection against deprivation of liberty without due process of law, we think that the proper inquiry is *whether those conditions amount to punishment* of the detainee.

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maximum shall be, is reposed solely (sic) in the Commissioner of Corrections who is the Third Party Defendant in this case, William H. Fauver.

App. 35a (affidavit of Joseph J. Maloney) (emphasis in original).

It is further plain, in light of the decision of the New Jersey Supreme Court in *Worthington*, that the Commissioner is correct as a matter of state law. The County was indeed without authority to agree to the population maximum. The only legal basis for the district court's endorsement of a maximum figure, is the holding that a population exceeding this number of inmates had resulted in unconstitutional conditions. It is even more plain that the district court's imposition of a target date, and his order to the Commissioner permanently to comply with N.J. Stat. Ann. 2C:43-10(3) (West 1982), can be remedied only by removal of the state prisoners.

Other than the provisions of (f), (g) and (h) noted herein, we do not understand the Commissioner to object to any provision of the consent judgment.

Bell v. Wolfish, supra, 441 U.S. at 535 (emphasis added). Noting that the Government may detain an individual to ensure his presence at trial, *id.* at 536, and that the Government traditionally has done so by "confinement in a facility which ... results in restricting the movement of a detainee," *id.* at 537, the Court concluded that the necessary inquiry was whether "the conditions and restrictions of the detention facility ... amount to punishment." *Id.* at 536-37. In order to determine whether "particular restrictions and conditions accompanying pretrial detention amount to punishment in the constitutional sense of that word," *id.* at 538, the Court stated that the list of factors identified in Kennedy v. Mendoza-Martinez, 372 U.S. 144, 168-69 (1963)[9] would provide useful guideposts. Focussing particularly upon the last two of the *Mendoza-Martinez* factors, the Court concluded that it "must decide whether the disability is imposed for the purpose of punishment or whether it is an incident of some other legitimate governmental purpose," and whether the disability or restraint "appears excessive in relation to the alternative purpose assigned (to it)." *Bell v. Wolfish, supra*, 441 U.S. at 538 *quoting Mendoza-Martinex*, 372 U.S. at

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9. In Kennedy v. Mendoza-Martinez, 372 U.S. 144 (1963) the Court, called upon the determine whether a statutory provision depriving individuals of citizenship constituted punishment, articulated a list of factors "traditionally applied to determine whether an Act of Congress is penal or regulatory in character." *Mendoza-Martinez, supra*, 372 U.S. at 168. These were:

> Whether the sanction involves an affirmative disability or restraint, whether it has historically been regarded as a punishment, whether it comes into play only on a finding of *scienter*, whether its operation will promote the traditional aims of punishment — retribution and deterrence, whether the behavior to which it applies is already a crime, whether an alternative purpose to which it may rationally be connected is assignable for it, and whether it appears excessive in relation to the alternative purpose assigned.

Id. at 168-169, 83 S.CT. at 567-68 (footnotes omitted).

168-69). The Court stated that, in the event that such a condition or restriction "is not reasonably related to a legitimate goal — if it is arbitrary or purposeless — a court permissibly may infer that the purpose of the governmental action is punishment." *Bell v. Wolfish, supra*, 441 U.S. at 539.

Developing this analysis further as it pertained to detainees, the Court stated:

> (I)n addition to ensuring the detainees' presence at trial, the effective management of the detention facility once the individual is confined is a valid objective that may justify imposition of conditions and restrictions of pretrial detention and dispel any inference that such restrictions are intended as punishment.

Bell v. Wolfish, supra, 441 U.S. at 540 (footnote omitted). The Court also noted that, in determining whether conditions and restrictions are reasonably related to such a purpose,

> courts must heed our warning that '(s)uch considerations are peculiarly within the province and professional expertise of corrections officials, and, in the absence of substantial evidence in the record to indicate that the officials have exaggerated their response to these considerations, courts should ordinarily defer to their expert judgment in such matters."

Id., 441 U.S. at 540 n. 23 (quoting *Pell v. Procunier*, 417 U.S. 817, 827 (1974)).

Finally, in applying these constitutional principles to the facts of the *Bell* case, the Court articulated the following standard for determining when untoward conditions of confinement are such as to be arguably excessive in relation to the purpose of managing the facility:

> confining a given number of people in a given amount of space in such a manner as to cause them to endure

genuine privations and hardship over an extended period of time might raise serious questions under the Due Process Clause as to whether those conditions amounted to punishment.

Bell v. Wolfish, supra, 441 U.S. at 542.

Thus, in determining in the present case whether conditions at the Jail are such as to amount to punishment, which would violate the due process rights of pre-trial detainees, we must ask, first, whether any legitimate purposes are served by these conditions, and second, whether these conditions are rationally related to these purposes. In assessing whether the conditions are reasonably related to the assigned purposes, we must, further, inquire as to whether these conditions "cause (inmates) to endure (such) genuine privations and hardship over an extended period of time," that the adverse conditions become excessive in relation to the purposes assigned for them. *Id.*

B.

On January 29, 1982, the district court, having before it motions by the County and the Commissioner to vacate the consent judgment, a motion by the inmates to hold the County in contempt of the consent judgment, and the motion by the County for a preliminary injunction ordering the Commissioner to remove state prisoners, and with the benefit of the New Jersey Supreme Court's ruling in *Worthington v. Fauver*, 88 N.J. 193 (1982), 440 A.2d 1128 (1982), determined that "the court is desperately in need of detailed information on the jail conditions as well as what efforts were or could have been made to abide by the consent order." App. 55a. To acquire this information, the district court thereupon appointed as Special Master the Honorable Worrall F. Mountain, a former Justice of the New Jersey Su-

preme Court[10] and a member of Governor Byrne's Task Force on Prison Overcrowding. App. 56a.

Justice Mountain made a tour of the facility on February 8, 1982, interviewed officials, administrators, corrections officers, and inmates, took testimony from state correctional officials, held discussions with counsel, and considered affidavits and other documents. App. 65a. On March 1, 1982, he filed a report setting forth proposed findings of fact, conclusions of law, and remedial recommendations. App. 63a-98a. The district court, noting that pursuant to Fed. R. Civ. P. 53(e) the Special Master's findings must be accepted unless clearly erroneous, *Union County, supra*, 537 F. Supp. at 998, adopted them without modification. *Id.* at 1001.

The Special Master found, App. 80a, and the district court specifically agreed, "that there has been no express intent to punish the inmates at the UCJ on the part of either the defendants or the third-party defendant." *Union County, supra*, 537 F. Supp. at 1002. This finding has not been questioned by any of the parties. Thus, we may proceed directly to the second step of the two-step *Bell* inquiry, and determine whether a legitimate purpose or purposes may be assigned for conditions at the Jail, and whether those conditions are excessive in relation to their purpose or purposes.

The district court held in substance that the effective management of a detention facility during a statewide prison overcrowding emergency, along with "the interests of local and state governments in not releasing (inmates) onto the streets," *Union County, supra*, 537 F. Supp. at 1003, were the two relevant legitimate governmental interests that might justify conditions at the Jail. *Id.* at 1002-03.

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10. Justice Mountain was a member of the New Jersey Supreme Court from 1971 until his retirement in June of 1979. App. 56a.

It is plain that there is a legitimate governmental interest in "effective management of (a) detention facility." *Bell v. Wolfish, supra*, 441 U.S. at 540. Yet, as the division of interests in this case between the County and the Commissioner reveals, "effective management of a detention facility during a statewide prison overcrowding emergency" serves two distinct governmental interests. First, the State of New Jersey has an interest, validated by the New Jersey Supreme Court in *Worthington v. Fauver, supra*, in "efficiently allocat(ing) inmates of state and county penal and correctional institutions to those institutions having available space in order to alleviate (statewide) overcrowding." *Worthington v. Fauver, supra*, 88 N.J. at 191; 440 A.2d at 1131 (quoting Executive Order No. 106 (Byrne)). Second, the County has an interest in "effectively managing the detention facility," even though, as the third-party complaint discloses, in some respects this interest in allocation of space. However, given that the State has invoked its interest in allocation of space to require the County to retain state prisoners, the County's effective management of the Jail must include management of the resultant overcrowded institution, and the two governmental interests to that extent coincide.

The district court was also correct in concluding that "the interests of local and state governments in not releasing onto the streets either pretrial detainees who are not bail worthy or convicted inmates, are legitimate ones." *Union County, supra*, 537 F. Supp. at 1003. *See Bell. v. Wolfish*, supra, 441 U.S. 539-40.

Thus, the district court properly proceeded to consider whether the conditions and restrictions of the Jail were rationally connected to these valid objectives and whether the conditions and restrictions were excessive in relation to these objectives. *See Bell v. Wolfish, supra*, 441 U.S. at 538. The district court found that the overcrowding at the Jail was rationally connected to the objective of not releasing in-

mates. It also found that the conditions resulting from overcrowding were "an *unavoidable* incident of the jail officials' efforts to effectively' manage the facility during a statewide prison overcrowding emergency." *Union County, supra*, 537 F. Supp. at 1002 (quoting the Special Master's Report). Thus, in effect, the district court found that the overcrowding was rationally connected to and served both state and county governmental interests. These findings are not questioned on this appeal.

C.

The only question thus remaining in the *Bell* inquiry is whether the conditions and restrictions resulting from inmate overcrowding can be considered excessive in relation to the purposes assigned for them. *See Bell v. Wolfish*, supra, 441 U.S. at 538. In this connection, the Special Master, after discussion of the *Bell* standard, found

> The totality of the overcrowding conditions at the jail, e.g., the unsuitable and unsanitary sleeping conditions resulting from inmates being forced to sleep on mattresses, the almost complete absence of recreational facilities, the cutbacks in visitation, the delays encountered in administering inmate programs, the inadequate lighting in the cellblocks, the inability to provide clean inmate clothing in accordance with N.J.A.C. 10A:31-3.13(b)(5), and the absence of a medical screening procedure for new inmates, amount to "genuine privations and hardship."

App. 81a-82a.

The Special Master recommended that the court hold that these privations and hardships "cannot be justified by the mere fact that a statewide prision overcrowding problem exists." App. 82a. The Special Master also recommended that

the court hold that each of six specific conditions at the Jail constituted punishment,[11] when considered in the light of the totality of the circumstances at the Jail. App. 82a-83a.

By the terms of the order appointing the Special Master, the parties were given ten days after the filing of his report to file objections that report. The County filed no objections, and neither did the inmates. The Commissioner did file objections, which focussed largely on the Special Master's refusal to accept certain remedial recommendations of the Department of Corrections. *See* App. 100a-101a. The Commissioner specifically noted that "(t)he State does not assert that it is proper for the County to require inmates to sleep on mattresses on the floor ... So the Special Master properly recommended that the floor mattresses practice should be eliminated." App. 122a.

At a hearing which was held on March 25, 1982, the district court considered the Commissioner's objections. The Attorney General, representing the Commissioner, argued that double bunking combined with measures promised by the County would cure any constitutional violation, and that the State needed more time to absorb any state

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11. These six conditions were:

(1) housing two, three, four or more inmates in detention cells without adequate sleeping arrangements, for more than a few days;

(2) requiring detainees to sleep on mattresses laid adjacent to toilets in single cells, for more than a few days;

(3) requiring detainees to sleep on mattresses laid on the floor in other parts of the Jail, for more than a few days;

(4) requiring detainees to wear the same clothing for several weeks, in violation of N.J.A.C. 10A:31-3.13;

(5) failing to screen new inmates for communicable diseases;

(6) depriving detainees of any meaningful opportunity for recreation.

App. 82a-83a.

prisoners to be transferred.[12] The State's position was that, if, as the Commissioner proposed, inmates were double bunked, adequate space and recreational facilities would be afforded. In that manner, the constitutional standard of *Bell v. Wolfish* would be satisfied.[13]

From these rather extended proceedings, which culminated in the district court's order of April 27, 1982, two conclusions emerge. First, from the positions taken by the County and the Commissioner, we do not understand either of them seriously to contest the unconstitutionality, in the context of overcrowded conditions, of forcing pre-trial detainees to sleep for more than a few days on mattresses placed on the floor of a 5' x 7' cell adjacent to an open toilet which both cellmates must use. Indeed, the County conceded, at oral argument before this court, that conditions as found by Justice Mountain were unconstitutional. Thus, the district court's implicit holding that conditions as found by the Special Master are "excessive in relation to the purposes assigned to them," is not questioned on this appeal.

Our second conclusion is that, of all the various conditions challenged as being unconstitutional, the most significant, and indeed the only condition not meeting constitutional standards, was the practice of placing a mattress on the floor for the second occupant of a cell designed for but

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12. We understand the term "double-celling" to mean the confinement of two inmates in a single general population cell, whatever accommodations may be provided. We understand the term "double-bunking" to mean the confinement of two inmates in a single general population cell, with each inmate being provided with a permanent bunk-type bed of his own. The Commissioner has suggested that the second bunk might be fastened to the cell wall above the first bunk, "with a hinge mechanism in order that the top bunk can be raised vertically until it rests against the cell wall," when not in use. App. 256a.

13. The State of New Jersey asked that the district court order the County to follow the Commissioner's recommendation to double-bunk the general population cells, and to reconvert the temporary dormitories to additional recreational areas. App. 195a.

one inmate. It is not surprising, therefore, that the Commissioner focussed on an alleviation of this latter condition by recommending double-bunking in such cells. The Commissioner contended that if, by providing double bunks, and by holding the County to its obligations under the consent agreement, constitutional objections to overcrowding could be overcome, then the Commissioner's discretion in determining where state prisoners should be placed, should not be overridden. We therefore turn to a consideration of the two-in-a-cell or double-bunking practice, as resolution of that issue will determine the outcome of this appeal.

D.

The district court held, first, that "based solely on considerations of space ... double-bunking at the (Jail) subjects pretrial detainees to genuine hardships amounting to punishment," *Union County, supra*, 537 F. Supp. at 1005, and, second, that, under the totality of circumstances at the Jail, double-bunking violates the due process rights of pretrial detainees. *Id.* at 1006-07.

The Commissioner argued that, if the general population cells in Jail were equipped with double bunks, then both the unconstitutional accommodations and the lack of recreational space would be remedied. App. 178a-79a. The Commissioner emphasized that even at the highest recorded population figure for the Jail less than three quarters of the 218 general population cells would have to be double-bunked,[14] and the district court assumed that one-half of the

14. This calculation assumed that the "detention cells could hold two inmates each, the 15 intake area cells could hold one inmate each, and the work release/trustee dorms could hold 26 inmates." The record reveals that the highest recorded population figure for the Jail was 385 inmates. App 188a. The Commissioner erroneously concluded that in order for the 322 inmates (those remaining after 63 had been accommodated in the detention, intake, and work release areas) to be placed in the 218 general population

cells would need to be double-bunked. *Union County, supra*, 537 F. Supp. at 1005. The Commissioner noted that if this were done the temporary dormitories could be removed from the former recreational areas, resulting in more than doubling the areas available for recreation. App. 190a. Finally, the Commissioner contended that the County could provide clean clothing weekly and medically screen all new inmates, even with the increased population resulting from double-bunking. App. 192a-93a[15] At oral argument before this court, the County contended that it had implemented an adequate medical screening program and that it had undertaken to procure supplies necessary for meeting the requirement for clean clothes. Thus, it would appear that the Commissioner's contention, that the County could provide clean clothes and medical screening, even with double bunking, is well founded and not apposed by the County.

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cells it would be necessary for 161 of these cells to be double-celled. *Id.* In fact, at that population figure, only 104 of the general population cells would need to be double celled (thus holding 208 inmates), and the remaining 114 inmates could be placed singly in the remaining 114 cells. Thus, at a population figure of 385, slightly less than half of the general population cells would have to be double-bunked. The district court was, therefore, roughly correct in figuring the spatial impact of double-bunking on the assumption that one-half of the general population cells would need to be double-bunked.

15. Indeed, at the March 25, 1982 hearing the County contended that it was able to provide clean clothes weekly to the inmates then at a population figure of 362. Transcript of Proceedings at 58-60. The County contended, however, that due to the "population explosion" it was unable to give all new inmates a complete physical check-up before putting them into the general population. *Id.* at 57-58. It should be noted, however, that the district court, in its order of April 27, 1982, required the County, pursuant to the consent judgment, to "implement a medical screening program for new admittees" and "to provide clean clothing weekly and clean towels daily." *Union County, supra*, 537 F. Supp. at 1015. The County did not appeal this order.

However, as noted, the district court rejected this remedial scheme put forth by the Commissioner on two separate grounds, first, that conditions would still violate the due process rights of detainees because of sheer lack of space, and second, that conditions would still violate their rights when the totality of circumstances in the Jail was considered. *Union County, supra*, 537 F. Supp. at 1005-07. We will consider these grounds in succession.

The record reveals that, even when double-bunked, the admittedly rather small cells at the Jail provide adequate space for sleeping, and thus, in the words of Justice Rehnquist in *Bell v. Wolfish*, "we fail to understand the emphasis of (the district court) on the amount of walking space in the 'double-bunked' rooms." *Bell v. Wolfish, supra*, 441 U.S. at 543 n.26.

With respect to the space available outside the cells the County was ordered to "provide at least one hour of recreation daily to each inmate." *Union County, supra*, 537 F. Supp. at 1015. Moreover, on the assumption that cells would be double-bunked, the former recreation areas were to be reclaimed. Based on the Special Master's finding, this reconstituted recreation area would be over 1,700 square feet in area. App. 68a, 89a. Thus, for at least one hour daily, inmates would have the use of an enlarged space. As for the space available to inmates during the remaining waking hours, the Special Master calculated that the square footage available per inmate, when one-half of each tier of cells is double-bunked, would vary from 41 to 45 square feet, depending on the number of cells. App. 72a. When, as has been done on several tiers of the Jail, for reasons not explained in the record, the entire tier has been double-celled, the available square footage per inmate (Including his share of his own cell) varies from 31 to 33.5 square feet. *Id.* This is indeed a "cramped and overcrowded" space. App. 84a. (Special Master's description), and very far from ideal. Yet the mitigating effects of larger recreational space for at

least an hour a day must also be recognized. *See Bell v. Wolfish, supra*, 441 U.S. at 543.

With the adoption of these recommendations, it is apparent that inmates would have adequate room for sleeping and a genuine opportunity for at least an hour of recreation. In this light, we find the spatial analysis employed by the district court unilluminating and unconvincing. It may be that confining detainees to a small space for much of the time could amount to "punishment," but if so, such a conclusion must be based on a qualitative and not a quantitative assessment of the resulting environment. Thus, for this reason we reject the district court's holding of unconstitutional conditions "based solely on considerations of space." *Union County, supra*, 537 F. Supp. at 1005.

E.

We proceed, therefore, to consider whether, under the totality of circumstances at the Jail as it would be under the Commissioner's proposed solution, overcrowding would be deemed to amount to punishment.[16] We recognize that this question is not an easy one, for although the Supreme Court held that, under the circumstances described in *Bell v. Wolfish*, "nothing even approaching (the degree of hardship which would 'raise serious questions under the Due Process Clause') is shown," *Bell v. Wolfish, supra*, 441 U.S. at 542, conditions at the Jail are evidently much worse than at the relatively spacious and modern facility in question in *Bell*. Focussing, however, upon the crucial constitutional findings of the Special Master, we are convinced that overall the

16. Because "(t)he restriction or condition at issue in this litigation is the severe overcrowding of the facility and the impact of the excess population on the provision of services and programs." *Union County*, 537 F. Supp. at 1002, we agree that the district court was correct to weigh the "excessiveness" of assigned state purposes in light of the totality of circumstances which had in fact resulted from the overcrowding situation.

remedial scheme proposed by the Commissioner passes constitutional muster.

First, and most importantly, providing double bunks will avoid the unsanitary and humiliating practice of forcing detainees to sleep on mattresses placed either on the floor adjacent to the toilet and at the feet of their cellmates, or elsewhere in the Jail. Second, double-bunking will avoid the practice of having more than two detainees without adequate sleeping arrangements in the detention cells. Third, double-bunking will make it possible for recreational areas at the Jail to be cleared and dedicated to their original function. Thus, the remedial scheme put forth by the Commissioner, combining double-bunking with discharge of the County's obligations under the consent judgment, would effectively cure all the conditions that were of particular concern to the Special Master.[17] Moreover, our own review of the record convinces us that pre-trial detainees are confined at the Jail "for generally a maximum period of 60 days." *Bell v. Wolfish, supra*, 441 U.S. at 543.[18]

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17. An undesirable condition remaining would be the admittedly cramped and overcrowded nature of the space in which detainees are confined. To a considerable extent this lack of space will be mitigated by the promised daily hour of recreation, by promised visitation, and by other programs which the Jail provides and which enable detainees to be away from their cellblocks for some two hours a week. App. 12a (complaint ¶ 26). 17a. (answer, admitting ¶ 26 of complaint).

18. An analysis of the Jail list as of January 11, 1982, submitted and relied upon by counsel for the inmates, shows 10 inmates awaiting disposition of charges before municipal courts, 103 inmates awaiting disposition of charges before grand juries, 96 inmates awaiting trial on state charges, and 18 inmates adjudged guilty and awaiting sentencing on state charges. None of the 113 inmates awaiting either disposition of municipal charges or action by grand juries had been confined for more than 60 days. Fifty-five of the 96 inmates awaiting trial on state charges had been confined for more than 60 days. Thus, of the 209 inmates who had not been

Thus, although the question is not without difficulty, we are satisfied that, if the Commissioner's proposals, described above, were fully implemented, conditions at the Jail would pass constitutional muster. *Bell v. Wolfish, supra*, 441 U.S. at 541-43.

V.

Sentenced Inmates

A.

In *Rhodes v. Chapman*, 452 U.S. 337 (1981) the Supreme Court considered "for the first time the limitation that the Eighth Amendment ... imposes upon the conditions in which a State may confine those convicted of crimes." *Rhodes v. Chapman, supra*, 452 U.S. at 344-45. The Court stated that

> No static 'test' can exist by which courts determine whether conditions of confinement are cruel and unusual, for the Eighth Amendment 'must draw its meaning from the evolving standards of decency that mark the progress of a maturing society.' *Trop v. Dulles*, 356 U.S. 86, 101 (1958) (plurality opinion).

Rhodes v. Chapman, supra, 452 U.S. at 346. The Court went on to emphasize that Eighth Amendment " 'judgment(s) should be informed by objective factors to the maximum possible extent.' " *Rhodes v. Chapman, supra*, 452 U.S. at 346 (quoting *Rummel v. Estelle, supra*, at 274-275, which quoted *Coker v. Georgia, supra*, at 592 (plurality opinion)).

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found guilty of any charge, only 55, or 26%, had been confined for more than 60 days. Only 39, or 19% had been confined more than 75 days. Thus, of those detainees confined at the Jail on January 11, 1982, about three-quarters had been confined for less than 60 days. The record does not indicate the percentage of those detained prior to conviction who are released within 60 days of being committed to the Jail *Cf. Bell v. Wolfish, supra*, 441 U.S. at 524 n.3.

Noting that the same principles apply "when the conditions of confinement compose the punishment at issue," *Rhodes v. Chapman, supra*, 452 U.S. at 347, the Court went on to characterize the circumstances under which such conditions might be held to constitute cruel and unusual punishment:

> Conditions must not involve the wanton and unnecessary infliction of pain, nor may they be grossly disproportionate to the severity of the crime warranting imprisonment ... In *Hutto v. Finney*, 437 U.S. 678 (1978), the conditions of confinement in two Arkansas prisons constituted cruel and unusual punishment because they *resulted in unquestioned and serious deprivations of basic human needs*. Conditions other than those in *Gamble* and *Hutto*, alone or in combination, *may deprive inmates of the minimal civilized measure of life's necessities*. Such conditions could be cruel and unusual under *the contemporary standard of decency* that we recognized in *Gamble*, 429 U.S. at 103-104. But conditions that cannot be said to be cruel and unusual under contemporary standards are not unconstitutional. To the extent that such conditions are restrictive and even harsh, they are part of the penalty that criminal offenders pay for their offenses against society.
>
> *Rhodes v. Chapman, supra*, 452 U.S. at 347 (emphasis added).

B.

In the present case, the Special Master recommended that the district court hold conditions at the Jail to be in violation of the Eighth Amendment in two respects.[19]

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19. With respect to the "basic human needs" recognized by Eighth Amendment cases, *see, e.g., Rhodes v. Chapman, supra*, 452 U.S. at 348-49 (food, medical care, sanitation, security); *Hutto v. Finney*, 437 U.S. 678, 681-83 (sanitation, clothing, security, food), the Special Master's findings were generally favorable to defendants.

He opined, first, that requiring two or more sentenced inmates to sleep for extended periods on mattresses laid on the floor of the detention cells amounts to "wanton and unnecessary punishment,"[20] and, second, that requiring sentenced inmates to sleep on mattresses placed on the floor "is so reprehensible and dehumanizing a practice when carried out for extended periods of time" that it violates the Eighth Amendment by inflicting " 'unnecessary and wanton' physiological and phychological pain." App. 87a-88a.

The district court also held that requiring sentenced inmates to sleep for long periods of time on mattresses placed on the floor was "a 'reprehensible and dehumanizing practice.' " Not following the Special Master's legal analysis, however, it went on to hold that such a practice "deprives these inmates of the essential requirement of habitable shelter," and that in consequence this practice violates the Eighth Amendment. *Union County, supra*, 537 F. Supp. at 1008.

Going further, however, the district court also held "that 30 square feet of daytime space or 19.5 square feet of sleeping space fails to meet any contemporary standard of decency especially in light of the impact overcrowding has had on visitation, recreation, and time off the tier." Id.[21] In consequence, the district court held that conditions even under the Commissioner's remedial scheme involving double-bunking, would constitute cruel and unusual punishment.

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20. He did not, however, regard it as unconstitutional to house two sentenced inmates in a single detention cell for substaintial periods "if the cells were equipped with two suitable beds." App. 87a n. 17.

21. The district court did, however, agree with the Special Master that the detention/isolation cells could constitutionally accommodate two persons if beds were provided. *Union County, supra*, 537 F. Supp. at 1008.

Id. at 1008-09. We do not agree.

C.

Here, as in the case of the pre-trial detainees, the Commissioner did not defend the constitutionality of forcing sentenced inmates to sleep on mattresses laid on the floor next to toilets. Rather, the Commissioner argued, without qualification, that the court should "direct the County to follow the recommendations of the Department to use bunk type beds in the general population cells and detention cells and thereby eliminate the use of floor mattresses in the jail." App. 195a. Similarly, on this appeal, the Commissioner, implicitly conceding the undesirability of placing mattresses on the floor, attacks only the further holding of the district court, that even double-bunking at the Jail would violate the Eighth Amendment, and argues that the district court erred by so holding on the basis of spatial considerations alone. *See* Appt. brief 18-19.

Having sustained the constitutionality of the Commissioner's remedial scheme, involving double-bunking and the County's obligations under the consent judgment with respect to pretrial detainees, *a fortiori*, we must hold that the same provisions meet constitutional standards for sentenced inmates, under the principles of *Rhodes v. Chapman*. *See Inmates of Allegheny County Jail v. Pierce*, 612 F. 2d 754, 762 (3d Cir. 1979) (if Eighth Amendment standard violated, due process standard applicable to pre-trial detainees must also be violated). *See also Gibson v. Lynch*, 652 F. 2d 348, 352 (3d Cir. 1981). Nevertheless, recognizing that the district court was faced with the necessity of grappling with a different constitutional standard in the context of sentenced inmates, we deem it appropriate briefly to consider the districts court's holding with regard to the "minimal civilized measure" of "habitable shelter" under the Eighth Amendment. *Union County*, 537 F. Supp at 1008.

The district court, relying upon *Battle v. Anderson*, 564 F. 2d 388 (10th Cir. 1977) and *Ramos v. Lamm*, 639 F. 2d 559 (10th Cir. 1980), rested its holding with regard to the basic necessity of "shelter" solely upon the following consideration:

> the stark reality is that 30 square feet of daytime space or 19.5 square feet of sleeping space fails to meet any contemporary standard of decency especially in light of the impact overcrowding has had on visitation, recreation and time off the tier.

Union County, supra, 537 F. Supp. at 1008.

The test which we must apply in reviewing the district court's determination that sentenced inmates would be subjected to cruel and unusual punishment under the Commissioner's double-bunking proposal is whether the resulting "conditions ... alone or in combination, ( ) deprive inmates of the minimal civilized measure of life's necessities." *Rhodes v. Chapman*, 452 U.S. at 347. The "necessity" of which the inmates were held to be deprived in this case is the necessity of "habitable shelter," as measured under "contemporary standards of decency,"[22] *Union County, supra*, 537 F. Supp. at 1008. The totality of circumstances relevant to this inquiry

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22. We note that the Supreme Court has emphasized time and again "that 'Eighth Amendment judgments should neither be nor appear to be merely the subjective views' of judges." *Rhodes v. Chapman*, 452 U.S. at 346 (quoting Rummel v. Estelle, 445 U.S. 263, 275 (1980)). *See also* Solem v. Helm, _____ U.S. _____, 51 U.S.L.W. 5019, 5023-24 (1983). Among the "objective indicia" of contemporary standards of decency to which the Court has looked are "history, the action of state legislatures, and the sentencing by

comprises all those circumstances that bear on the nature of the *shelter* afforded to sentenced inmates. *See Hoptowit v. Ray*, 682 F. 2d 1237, 1247 (9th Cir. 1982).[23] We believe that, just as the district court in *Hoptowit* erred, in this case the district court has also erred by "rely(ing) exclusively on per capita square footage recommendations." In doing so, it failed to consider the totality of the circumstances relevant to determining whether conditions have fallen to the "level at which the shelter of inmates is unfit for human habitation." *Hoptowit v. Ray*, 682 F. 2d at 1249[24] Rather, the district court here, relying upon the holding of the Tenth Circuit in *Battle, supra*, held that "30 square feet of daytime space or 19.5 square feet of sleeping space" was constitutionally inade-

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NOTE — *(Continued)*
injuries" as well as basic background facts about the relation between inmates and prison authorities. *Rhodes v. Chapman*, 452 U.S. at 346-47. Because neither the Special Master nor the district court refers us to such factors, their conclusions undeniably "appear to be merely the subjective views of (these) judges." *See Rhodes v. Chapman*, 452 U.S. at 346.

23. The Ninth Circuit in Hoptowit v. Ray, 682 F. 2d 1237 (9th Cir. 1982), applied the analysis adopted previously in Wright v. Rushen, 642 F. 2d 1129, 1133 (9th Cir. 1981) ("a court should examine each challenged condition of confinement, such as the adequacy of the quarters, food, medical care, etc. ... any condition of confinement which passes this test is immune from federal intervention.") *See also* Ruiz v. Estelle, 679 F. 2d 1115, 1139 n. 98 (5th Cir. 1982).

24. In *Hoptowit*, supra, the district court, evaluating conditions in the Washington state penitentiary, simply constitutionalized the minimum standards for space set out by the American Correctional Association. Although the district court had also found high levels of violence and deficiencies in medical care at the penitentiary, the court of appeals remanded for further findings as to what conditions had resulted from the overcrowding. In particular, the court directed findings as to how much time per day inmates spent in their cells, whether increased violence was out of proportion to the increase in population, and what effect overcrowding had had on other constitutionally required services. 682 F.2d at 1248-49.

quate as shelter. *Union County*, 537 F. Supp. at 1008.[25] Yet even the apparently *per se* rule requiring 60 square feet per inmate, adopted by the Tenth Circuit in *Battle*, 564 F.2d at 395, was adopted as a necessary remedial measure in the face of long-continued conditions of confinement that were plainly much worse than those facing inmates at the Jail.[26]

In the instant case, the district court failed to consider that the sentenced inmates spend much less time at the Jail than did the prisoners in question in *Rhodes*, "67% of whom were serving life or other long-term sentences." *Rhodes v. Chapman, supra*, 452 U.S. at 341.[27] Yet, as the Supreme Court, and the courts of appeal have repeatedly recognized in Eighth Amendment challenges, "the length of confine-

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25. We do not regard the district court's inquiry as adequate to support his conclusion that conditions at the Jail are such as to "cause (inmates') degeneration or threaten (their) mental and physical well-being." Battle v. Anderson, 564 F.2d 388, 403 (10th Cir. 1977). The cramped and unpleasant conditions at the Jail pale by comparison to conditions in the Oklahoma penal facilities in question in *Battle*, in which inmates, confined in facilities devastated by riots, were deprived of physical security, medical care, access to the courts, and other constitutional rights. Thus, even if we were to adopt the standard employed in *Battle*, and we do not, we would still hold that under the totality of conditions at the Jail sentenced inmates have not been deprived of "habitable shelter."

26. We note, further, that the emphasis in the *Battle* case and in Ramos v. Lamm, 639 F.2d 559 (10th Cir. 1980), *cert. denied* 450 U.S. 1041 (1981), on the amount of space required to provide a *rehabilitative* environment, is in any case weakened as precedent after *Rhodes*. See Atiyeh v. Capps, 449 U.S. 1312, 1316 (1981) (Rehnquist, J. opinion in chambers) (granting stay of district court order pending decision of *Rhodes)* (criticizing, *inter alia*, district court's emphasis on rehabilitative qualities of prison environment); *Rhodes v. Chapman*, 452 U.S. at 348-49 (Powell J. for the Court):

> We would have to wrench the Eighth Amendment from its language and history to hold that delay of these desirable aids to rehabilitation violates the Constitution

27. The Special Master found that on February 15, 1982, 81 of the 359 inmates of the Jail were awaiting transfer to state prisons and that 57 of these 81 had been at the Jail for at least 75 days. App.

ment cannot be ignored in deciding whether the confinement meets constitutional standards." *Hutto v. Finney*, 437 U.S. 678, 686 (1978).

2.

Further, the overall length of confinement is only one factor among several that must be considered by a district court, in evaluating the totality of circumstances relevant to any alleged constitutional deficiency in shelter. "Neither the number of inmates in one cell nor the amount of space provided for an inmate in a dormitory alone determines whether confinement is cruel and unusual." *Ruiz v. Estelle*, 679 F.2d 1115, 1146 (5th Cir. 1982). Also relevant is how much time prisoners must spend in their cells each day,[28] *see Hoptowit v. Ray*, 682 F.2d at 1249, the opportunities for inmate activities outside of the cells,[29] and the general state of repair

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NOTE — (Continued)
69a-70a. He made no further findings as to exactly how long these 57 had been at the Jail, or as to how long state prisoners typically spent at the Jail before transfer. It should also be noted that, after transfer to state prison, state prisoners will generally be afforded cells of their own, be allowed to have more personal items in their possession, and be provided with a wider range of services and facilities than the Jail offers. The Commissioner defended his decision that county facilities rather than state prisons should be double-celled on the grounds that state prisoners are generally "an aggressive and assaultive type of population" who will be confined for much longer, thus making it necessary "to relieve a lot of pressures." App. 189a-90a (Commissioner's Supplemental Brief on Double Bunking).

It should also be remembered that, in addition to state prisoners, there are in the Jail county prisoners, who are being held for the serving of shorter sentences. The Special Master made no findings as to the typical length of stay for county prisoners. The jail list for January 11, 1982 showed 28 county prisoners, with sentences ranging from 30 days to nine months, the majority being in the three to six month range.

28. As we concluded previously, the admittedly small cells

and function of the facilities provided.[30]

"provide more than adequate space for sleeping." *Bell v. Wolfish*, 441 U.S. at 543. As the Special Master found, the inmates "are locked in their cells between 10 p.m. and 6 a.m.," and "at all other times of the day they are permitted access to the cell corridor." App. 67a. The cell corridor is "approximately 5 1/2 feet wide and varies in length from 40 feet to 70 feet depending upon the number of cells in a given tier," *id.*, and "(e)ach cell corridor is equipped with one television set and one telephone." App. 67a-68a.

29. On a twelve-cell tier that was completely double-celled (as it appears that some were), inmates would for most of the day have a choice between remaining in their cells or sharing a 5 and 1/2 by 60 foot space with their twenty-three cellblock mates. Although this common area is not spacious, it does provide adequate space for such exercises as push-ups, sit-ups, and even walking.

The remedial scheme proposed by the Commissioner contemplated that the former recreation areas, measuring over 1700 square feet, would be cleared and rededicated to their original use. The district court, pursuant to the consent judgment, also ordered the County to "provide at least one hour of recreation daily to each inmate," and to "reinstitute a program of at least three one-quarter hour visitation periods per week." *Union County*, 537 F. Supp. at 1015. Further, the inmates themselves alleged, in their complaint, that inmates who choose to avail themselves of "counselling programs, chapel, educational activities, and related programs ... may be away from their cellblocks for perhaps an additional two hours per week." App. 12a. Thus, under the Commissioner's proposal, inmates may be away from the admittedly crowded cellblock for some ten hours per week, including seven hours of opportunity for exercise in the enlarged recreational space.

30. In this case, in contrast to other cases in which federal courts have found prison conditions unconstitutional, there has been no finding that basic physical facilities such as plumbing, heating, ventilation, and showers, are inadequate. Although the Special Master characterized the Jail as "an aging eight story detention facility located in the heart of Elizabeth, New Jersey." App. 66a, it does not appear from the record that the Jail has been allowed to fall into disrepair in these basic respects. This fact is significant both because it indicates a good faith effort on the part of the County to maintain the facility, and because denial of such basic physical amenities, and the consequent effect on sanitation and health, go to the heart of what is meant by "habitable shelter" for the Eighth Amendment purposes. In those cases where federal

We therefore conclude that the district court erred in holding conditions at the Jail, as they would be if the double-bunking remedial scheme proposed by the Commissioner were adopted, to be in violation of the Eighth Amendment. If sentenced inmates were double-celled and provided with bunk-type beds of their own, and if the County discharged its duties under the consent judgment, as it was obliged to do, then there can be no doubt that the resulting conditions would not "deprive inmates of the minimal civilized measure of" shelter. *Rhodes v. Chapman*, 452 U.S. at 347.

VI.

Remedy

"Although a district court has wide discretion in tailoring a remedial injunction, that discretion is not unconfined." *Ruiz v. Estelle*, 679 F.2d at 1144-45. The Supreme Court and the courts of appeal have articulated several limiting principles that must guide the district court in fashioning appropriate relief.

First, and perhaps most importantly, the Eighth Amendment does not give a federal court "a roving commission to impose upon the (correctional institutions of New Jersey its) own notions of enlightened policy." *Rummel v. Estelle*, 445 U.S. 263, 285 (Stewart, J., concurring) (1980). Rather, " 'the nature of the violation determines the scope of the remedy.' Therefore, a court can order only relief sufficient to correct the violation found." *Ruiz v. Estelle*, 679 F.2d at 1145 (quot-

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NOTE — (Continued)
courts have found unconstitutional prison conditions, a decaying physical plant allowed by disrepair to become virtually inoperable has almost always provided an important background element. *See, e.g., Ramos v. Lamm, supra; Battle v. Anderson, supra.*

ing *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1, 16 (1971). Neither may the court "use the totality of all conditions to justify federal intervention requiring remedies more extensive than we required to correct Eighth Amendment violations." *Wright v. Rushen*, 642 F.2d 1129, 1133 (9th Cir. 1981).

Second, "the federal courts in devising a remedy must take into account the interests of state and local authorities in managing their own affairs, consistent with the Constitution." *Milliken v. Bradley*, 433 U.S. 267, 280-81 (1977). What this means in practice is that "state and local authorities have primary responsibility for curing constitutional violations." *Hutto v. Finney*, 432 U.S. at 687 n.9. It is when these " 'authorities fail in their affirmative obligations ... (that) judicial authority may be invoked.' " *Hutto v. Finney*, 432 U.S. at 687 n.9 (quoting *Milliken v. Bradley*, 433 U.S. at 281).

A.

The district court in this case ordered the Commissioner "to remove any and all inmates incarcerated at the Union County Jail who as of fifteen (15) days prior to that date (July 1, 1982) have been sentenced to terms of imprisonment in state facilities; and ... fully (to) comply with N.J.S.A. 2C:43-10(e) (providing for removal of state prisoners within fifteen days of sentencing) with respect to persons who are or shall be incarcerated at the Union County Jail." *Union County*, 537 F. Supp. at 1015.

This order is in express contravention of Executive Orders, issued by Governors Byrne and Kean, that suspend operation of N.J. Stat. Ann. 2C:43-10(e) (West 1982) and confer upon the Commissioner discretion to designate the place of confinement for state prisoners. Relying upon its authority under the Fourteenth and Eighth Amendment and the Supremacy Clause, however, the district court held that

(t)he administrative action designating the UCJ as the place of confinement of state sentenced inmates is void and N.J.S.A. 2C:43-10(e) shall be given full force and effect.

Union County, 537 F. Supp. at 1009. This holding is based, in turn, upon the district court's conclusion that conditions in the Jail would violate the Fourteenth and Eighth Amendments even if the double-bunking scheme proposed by the Commissioner were implemented. For, only if conditions in the Jail could not be rendered constitutional without reduction of the population, would removal of the state prisoners be required as a constitutional remedy.

We have concluded, however, that the district court erred when it held that the Commissioner's remedial scheme, if implemented by the County and the State, would not cure existing Fourteenth and Eighth Amendment violations. Thus, the crucial constitutional predicate for the court's order is lacking.

The Commissioner, in the exercise of his "primary responsibility for curing constitutional violations," *Hutto v. Finney*, 437 U.S. at 687 n.9, has in due course and in evident good faith come forward at the earliest opportunity with a remedial scheme to cure the violations found by the Special Master. Under the governing standards of *Bell v. Wolfish* and *Rhodes v. Chapman*, the Commissioner's recommendation, once implemented, would cure the due process and Eighth Amendment violations that have been found to exist in the Jail. This is not, therefore, a case in which "(t)he District Court had given the (Commissioner) repeated opportunities to remedy the (unconstitutional) conditions in the ... cells." *Hutto v. Finney*, 437 U.S. at 687.

B.

It has been argued in support of the district court's order that the remedy ordered by the district court is actually less intrusive than the recommendations made by the Commis-

sioner. Brief of Plaintiffs-Appellees at 50-52. This is said to be so because a single order to remove an easily identifiable group of inmates may be carried out with less interference in administration of day-to-day operation of the Jail than would be required to implement the double-bunking scheme urged by the Commissioner. We emphasize, however, that the intrusiveness of an order cannot be assessed apart from its impact on the state authorities involved. There can be no question in light of the fundamental "interests of state and local authorities in managing their own affairs," *Milliken v. Bradley*, 433 U.S. at 281, that a constitutionally adequate remedial scheme developed by the responsible officials and carried out within the context of existing state institutional structures, would be far less intrusive than a remedy imposed on those officials against their own administrative judgment by means of the abrogation of state institutional arrangements.

VII.

We therefore hold that the district court, in its zeal to correct what it perceived as unconscionable conditions, improperly exercised its discretion by rejecting the Commissioner's proposed remedial scheme and by ordering the removal of state prisoners from the county facility. Accordingly, we will reverse and remand this case to the district court with the following directions, with regard to the district court's order of April 27, 1982. *Union County*, 537 F. Supp. at 1014-15. The district court is directed:

I. To vacate paragraph (1) (ordering removal of state prisoners by July 1, 1982); and

II. To vacate paragraph (2) (ordering compliance with N.J. Stat. Ann. 2C:43-10(e) (West 1982) despite suspension of this fifteen-day removal provision by Executive Order); and

III. To vacate paragraph (f) (confirming the "maximum capacity" for the Jail), paragraph (g) (giving the Commis-

sioner until July 1, 1982 to achieve that population figure), and paragraph (h) (empowering the County to "notify the Department of Corrections to remove any state prisoners who have remained at the facility beyond the statutory fifteen (15) day period since sentence was imposed") of the October 22, 1981 consent judgment, which paragraphs are incorporated into and made part of the April 27, 1982 order. *Union County*, 537 F. Supp. at 1015.

As for the remaining portions of the April 27, 1982 order, we will remand to the district court for reconsideration and modification, if necessary, in light of our foregoing discussion, and for such other proceedings as are consistent with this opinion. We point out as well that, because changes not reflected in the record before us may have occurred in the time that has elapsed since the district court entered its April 27, 1982 order, the district court, if in its discretion it should deem necessary, should not regard itself as precluded by this opinion from supplementing the record. In particular, the court may wish to develop further the manner, and time, in which the Commissioner's remedial proposals are to be implemented, and may itself take any other steps it deems necessary to require compliance with the constitutional mandates of *Bell* and *Rhodes* as we have construed them in this opinion.

A True Copy:

Teste:

Clerk of the United States Court of Appeals
for the Third Circuit

(A.O.U.S. Courts, The Legal Intelligencer, Phila., Pa.)

United States District Court
District of New Jersey
Civil No. 81-863

UNION COUNTY JAIL INMATES,
TIMMIE LEE BARLOW, et. al.,

Plaintiffs

v.

JAMES SCANLON, THOMAS
JEFFERSON, etc. et. al.,

Defendants

v.

WILLIAM H. FAUVER, Commissioner,
Department of Corrections,

Third-Party Defendant.

OPINION

BEFORE: HON. HAROLD A. ACKERMAN, U.S.D.J.

APPEARANCES:

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ACKERMAN, District Judge[*]

It is no secret that crime is one of the most serious problems facing this country. People properly perceive it as a disease of epidemic proportions affecting the very well-being of society.[1] It is understandable that the public, acting through its appointed and elected representatives, has attempted to respond forcefully by apprehending, prosecuting, convicting, and in appropriate circumstances, incarcerating the perpetrators of crime.

Incarceration, especially for violent criminals, is increasingly considered to be the appropriate response to criminal behavior.[2] For this reason, the legislatures of many jurisdictions have reacted to this epidemic through the passage of new laws significantly stiffening penalties to be meted out to offenders and adjusting parole guidelines. New Jersey is no exception. The new criminal code has already had an appreciable impact on the number and length of incarcerative sentences.[3]

As in inevitable consequence of this war on crime, there has been an enormous increase in the population of correctional facilities in this country.[4] Again, New Jersey is no exception.[5] The erection of new correctional facilities to accomodate the increased jail and prison populations has been urged by many responsible leaders including Chief Justice Warren E. Burger.[6] To date, new construction has not kept pace with the demand for prison space.

Institutions have become not just crowded but overcrowded. The reduced habitability of correctional facilities has in turn spawned a flood of lawsuits by prisoners in the federal courts.[7] The complaints alleging violations of the United States Constitution paint an egregious picture of the conditions of confinement in both state and federal institutions. The allegations implicate the Fifth and Fourteenth Amendments with respect to the confinement of those who stand accused but who are not free on bail (pretrial detainees). They raise Eighth and Fourteenth Amendment issues with

respect to sentenced offenders. These amendments protect, respectively, pretrial detainees from subjection to punishment without due process, *Bell v. Wolfish*, 441 U.S. 520 (1979), and sentenced persons from subjection to cruel and unusual punishment, *Rhodes v. Chapman*, 452 U.S. 337 (1981). Courts, while being sensitive to the public desire to incarcerate criminals, must, when called upon, examine the conditions of incarceration because "people are sent to prison as punishment, not for punishment.[8]

This action involves the overcrowded conditions at the Union County Jail ("UCJ"). The plaintiffs, represented by the New Jersey Public Defender,[9] brought suit a year ago against the Union County officials who administer the UCJ (hereinafter referred to collectively as the "County").[10] The County, alleging that the overcrowded condition of the UCJ is caused in whole or in part by the refusal of the New Jersey Department of Corrections to remove those UCJ inmates who have been sentenced to state prison terms, has impleaded as a third-party defendant, William H. Fauver, Commissioner of the Department of Corrections. Everyone agrees that the UCJ is overcrowded. The only issue in this case is whether the conditions in the jail have fallen below the standards consitutionally mandated. I find that they have.

PROCEDURAL HISTORY

This case has taken a unique procedural path. On October 22, 1981, the Public Defender and the County submitted to the Court for its approval a stipulation of settlement which provided, *inter alia*, for a population cap in the UCJ of 238.[11] The settlement was approved and entered into the record as a consent judgment. The third-party defendant was not a party to that settlement. Subsequently, the County sought a preliminary injunction compelling the Commissioner to withdraw immediately those UCJ inmates sentenced to state prison terms in order to enable the County to comply with the settlement agreement. In response to the

request, the Commissioner moved to vacate the consent judgment asserting that the County was without the authority to have entered into it under the terms of Governor Byrne's Executive Orders Nos. 106 and 108, dated June 19, 1981 and September 11, 1981. Those Executive Orders declared a state of emergency in the state prison system due to overcrowding, suspended the operation of *N.J.S.A.* 2C:43-10(e) which mandated the removal of state sentenced inmates within 15 days of sentencing, and granted to the Commissioner authority to designate the place of confinement of any state or county inmate.

In order to avoid a potential confrontation between the state executive government and the federal judiciary, I stayed the hearing on the County's order to show cause and the Commissioner's motion to vacate the consent judgment. At that time, the appeal of a decision by the Appellate Division of the Superior Court of New Jersey upholding the Governor's orders was pending before the New Jersey Supreme Court. On January 6, 1982, the appeal was decided. *Worthington v. Fauver,* 88 N.J. 183 (1982). In *Worthington,* Justice Pashman, writing for a unanimous court, held that the executive orders were a valid exercise of power delegated to the Governor under the Civil Defense and Disaster Control Act. The Court also held that they did not violate the state constitutional doctrine of separation of powers, and that the Commissioner's action in designating the county jails as the place of confinement of state sentenced inmates currently housed there was not arbitrary or capricious.[12]

On January 20, 1982, counsel for all of the parties in this litigation were heard on the previously stayed motions, as well as on a motion made by the County to vacate the consent judgment, and on plainfiff's motion that the County be found in contempt for failure to abide by the terms of the consent judgment. On January 29, 1982, I denied the third-party defendant's motion to vacate the consent order. Consideration of the other motions was deferred. At that time, I determined that a Special Master should be appointed pur-

suant to Fed. R. Civ. P. 53 to undertake a thorough examination of the conditions in the UCJ and to investigate the extent of the County's compliance with the consent judgment.[13] The Special Master, the Hon. Worrall F. Mountain, filed his report with the Court on February 26, 1982.[14] Objections were duly filed by the Commissioner and a hearing was held on March 25, 1982. I must now decide whether to accept, reject or modify the Special Master's report. Fed. R. Civ. P. 53(e) (2). For the reasons which I will articulate *infra*, I have determined that his findings of fact should be adopted. I will also accept, with certain specific modifications, the proposed conclusions of law. The remedy outlined by the Special Master will be followed in all material respects.

FINDINGS OF FACT OF SPECIAL MASTER

Rule 53(e) (2) sets forth the standard of review to be applied to a master's findings of fact: "In an action to be tried without a jury the court shall accept the master's findings of fact unless clearly erroneous." *See also Kyriazi v. Western Electric Co.*, 647 F.2d 388, 396 (3d Cir. 1981). The findings of the Special Master therefore carry a presumption of correctness. The burden is on an objector to overcome that presumption. *See Halderman v. Pennhurst State School and Hospital*, No. 74-1345 (E.D.Pa. Feb. 26, 1982). However, such a presumption does not apply to the conclusions of law proposed by the Special Master. I may not abdicate my responsibility to make a legal determination as to the constitutional significance of the facts as found. *See Polin v. Dun & Bradstreet, Inc.*, 634 F.2d 1319, 1321 (10th Cir. 1980).

The Special Master's findings of fact show the following: The UCJ is an aging eight-story facility located in the urban center of Elizabeth, New Jersey. As a county jail, it houses pretrial detainees and persons sentenced within the county to terms of less than one year. *N.J.S.A.* 2C:43-10(c). Persons sentenced to terms of one year or more normally may be housed at the UCJ for up to 15 days before they are transferred to a state facility, but under the declared state of

emergency, they are being housed at the UCJ until the Commissioner determines otherwise.

The daily population of the UCJ has averaged well over 300 inmates for the last several months. On February 8, 1982, the date the Special Master toured the facility, there were 350 inmates housed at the UCJ, of whom 92 were awaiting transfer to state prisons. On February 15, 1982, there were 359 inmates, of whom 81 were awaiting transfer. On February 24, 1982, the total population at the UCJ was 385, of whom 101 were awaiting transfer to state facilities. At the hearing on the objections to the Special Master's report, counsel for the County defendants stated that the UCJ population as of March 24, 1982, was 362 inmates of whom 97 were state sentenced inmates. As of the week of April 19, 1982, the population had risen to 392, of whom 115 were state sentenced inmates. *See* Affidavit of Gary Mitchell, filed April 22, 1982.

It can be calculated from the facts adduced by the Special Master with respect to the jail population on February 15, 1982, that pretrial detainees account for approximately 57% of the total population. The duration of confinement of the persons being housed at the UCJ on that particular date was in excess of 75 days for 36.5% of the population, more than 45 days but less than 75 days for 18.1% of the population, and less than 45 days for 45.4% of the population. Of those inmates who had been at the UCJ for more than 75 days as of February 15, 1982, 53.4% were pretrial detainees. A further breakdown of the category of persons who had already been confined for 45 days indicates that 57% were pretrial detainees.

The UCJ contains 218 general population cells arranged on 19 tiers. Each cell is equipped with a single bed and a combination toilet/sink fixture. All the the general population cells, with the exception of one each on A and B tiers, measure approximately 39 square feet. Of this, approximately 22 square feet are taken up by the furnishings. A corridor fronts the cells on each tier and increases the area accessible to inmates between 6:00 a.m. and 10:00 p.m. by

an average of 23 to 28 square feet per inmate, assuming each cell houses only one person. Each cell corridor is equipped with one television set and one telephone. As there are no dining rooms at the UCJ, inmates take their meals on the tiers off trays brought by hot carts. Illumination for the cell areas comes from lights in the "officer's corridor" which runs parallel to the cell corridors and is separated from it by iron bars. All parties conceded to the Special Master that the lighting needs to be improved and the County is prepared to do so.

There are 10 detention/isolation cells ranging in size from 83 square feet to 113 square feet. These cells house inmates guilty of disciplinary infractions or those in need of medical isolation. Each contains a single bed and some are equipped with toilet fixtures.

In addition to the general population and detention cells, there is a "trustees/work release" dormitory currently housing approximately 26 inmates on single and double bunk beds and providing approximately 42.5 square feet per inmate. Two temporary dormitories have also been established in order to accommodate the increased population. Approximately 60% of the men's recreation area has been converted into bedspace for 26 to 28 inmates with an average area of confinement per inmate of 39 square feet. A second temporary dormitory has been constructed in the women's recreation area to provide housing for approximately eight more women with an average area of confinement of 47 square feet. Male dormitory inmates are confined to the dormitory area for substantially the entire day. For security reasons, the female dormitory inmates are confined to the women's tier cell corridor with all of the other women inmates during the daytime hours.

In spite of the creation of temporary dormitories, the County has had to resort to double-celling on the general population tiers in order to house all of the inmates in its custody. Since there is only a single bunk in a general population cell, double celling has been accomplished by placing a mattress on the floor at night. Measuring approx-

inmately 16 square feet, the mattress must be placed adjacent to the toilet and occupies virtually all of the otherwise free floor space in the cell. The Special Master found that the double-celling practice has had its greatest impact on the pretrial segment of the population.

Double-celling reduces the night space per inmate from 39 square feet to 19.5 square feet, which includes the bed, the mattress and the toilet/sink fixture. As stated above, the *floor* space is nonexistent. The cell corridor space is also decreased in proportion to the number of cells on the tier that are housing two persons. If half the cells on a tier are being used to house two inmates, the average corridor space per inmate for daytime use is between 15 and 21 square feet, depending on the particular tier. If all the cells on a tier have double occupancy, the corridor space per inmate is only between 11 and 14 square feet. The cell corridor on the women's tier is even more crowded when total double-celling occurs because the women in the temporary dormitory are also confined there during the daytime hours.

When the population at the UCJ has surpassed 365, some inmates have been assigned to mattresses placed on the floor in the laundry area or law library area. These inmates continue to sleep in these areas until the population is reduced, or until they are released or transferred.

The detention/isolation cells have also been affected by the overcrowded conditions at the UCJ. Some of these cells are being used to house as many as four inmates, of whom three must sleep on mattresses laid out on the floor. Inmates in these cells are confined there for all but a few hours a week. Some of the detention cells are equipped with a toilet fixture and group showers are provided daily.

The Special Master further found that severely overcrowded conditions at the UCJ have had an adverse impact on the support services and inmate programs provided. Recreational opportunity has been especially curtailed due to the increased population and the decreased space available for recreation. Recreation for male inmates is limited to no more than one hour periods, twice per week, which time is also

used for access to the law library. The recreational equipment available to the men consists of a ping-pong table and a weight machine. Recreation for the female inmates has been totally eliminated since that room was converted into dormitory space. No outdoor exercise area is provided or feasible because of the UCJ's urban location. The Special Master stated in his findings with respect to this program: "Under existing conditions, I find that there is almost no realistic opportunity for male inmates to enjoy recreation while confined at the UCJ." Special Master's Report ("SMR"), at 13.

Visitation privileges have also been curtailed as a result of the severe overcrowding. Formerly, inmates could receive visitors three times a week for up to one-half hour. Currently, the visitation period must be limited to five or ten minutes and even with that adjustment, not all visitors can be accommodated.

In addition to the impact of the overcrowded conditions on recreation and visitation, the Special Master found that there has been some noncompliance with the State regulation requiring that inmates be provided clean clothes weekly and clean towels daily. Other programs, although they are being administered, have naturally been overburdened by the demands of an increased population. The lack of a screening medical examination during the admission process, while not a phenomenon related to the overcrowding, was found to pose a serious health risk to all inmates.

Instances of fighting amongst inmates have increased due to the overcrowded conditions at the UCJ. Tension has also increased. These present problems could develop into an extremely serious security problem if the UCJ continues at its current population levels into the hot summer months.

OBJECTIONS

There have been no fundamental objections raised by the parties with respect to the Special Master's proposed findings of fact. The County has not filed any objections to the

report. The Commissioner's objections with respect to the findings of fact refer only to the Special Master's recommended remedy for alleviating the conditions at the UCJ. Consideration of these objections will be deferred until I have discussed the proposed conclusions of law. The Public Defender has suggested that the proposed findings of fact as to adequacy of certain services are not erroneous if taken in tandem with the improvements already promised by the County, *e.g.*, an increase in the budget for additional medical and dental services. As the County has represented that these services will be improved, I do not find that consideration of this objection is necessary.

I have determined that none of the proposed findings of fact are clearly erroneous, and I shall therefore adopt them without modification.

CONCLUSIONS OF THE SPECIAL MASTER

Based upon the facts as found, the Special Master concluded that the overcrowded conditions at the UCJ do amount to punishment of the pretrial detainees, *Bell v. Wolfish, supra.*, and cruel and unusual punishment of sentenced inmates, *Rhodes v. Chapman, supra.* Specifically, he suggested that the total impact of the following conditions violate the due process rights of the pretrial detainees:

> (T)he unsuitable and unsanitary sleeping conditions resulting from inmates being forced to sleep on mattresses, the almost complete absence of recreational facilities, the cutbacks in visitation, the delays encountered in administering inmate programs, the inadequate lighting in the cellblocks, the inability to provide clean inmate clothing in accordance with *N.J.A.C.* 10A:31-3.13 (b) (5), and the absence of a medical screening procedure for new inmates, amount to "genuine privations and hardships" which cannot be justified by

> the mere fact that a statewide prison overcrowding problem exists.

SMR, at 19-20.

With respect to sentenced inmates, the Special Master applied the *Rhodes* standard and proposed that "the totality of the conditions currently existing in the UCJ is so severe, in at least two respects, that it exceeds contemporary standards of dignity, humanity and decency and therefore constitutes cruel and unusual punishment." SMR, at 24. Those two respects are the confinement of more than one inmate in each detention cell on floor mattresses for more than several days and the utilization of floor mattresses in the general population cells, library, and laundry areas, for extended periods of time.

The Special Master, pursuant to the Order of Reference dated January 29, 1982, also addressed the issue of the maximum jail capacity that could be constitutionally accommodated. He recommended a maximum capacity of 244 persons which represents single occupancy in each of the 218 general population cells plus the 26 bedspaces in the "trustee/work release" dormitory.[15] He determined that the temporary male and female dormitories must be reconverted to recreational space in order to reinstitute daily recreation. A proposal consisting of certain structural changes put forward by the third-party defendant was rejected primarily because its implementation would exacerbate the already insufficient recreation opportunity. Secondarily, the Special Master found that the "benefit" to be gained from these proposed temporary solutions was substantially outweighed by the costs.

Finally, the Special Master recommended as corrective measures that the County eliminate all uses of mattresses, reconvert the temporary dormitories to recreation space, develop a medical screening procedure, and take all steps necessary to provide clean clothing to inmates in accordance with *N.J.A.C.* 10A:31-3.13 (b) (5). Furthermore, it was recommended in the report that both the County and the Commissioner be given a reasonable period of time in which

to reduce the jail population to the 244 cap. The Commissioner should act by removing the state sentenced inmates; the County should act through the means stipulated to in the Consent Judgment of October 22, 1981.

OBJECTIONS

Objections have been raised by the third-party defendant to the legal standards applied by the Special Master and the legal conclusions drawn therefrom. As stated above, Fed.R.Civ.P. 53(e) (4) requires the district court to review the proposed conclusions of law of the master and determine for itself whether violations exist. I have determined that the Special Master applied the correct legal principles to the conditions at the UCJ and drew the correct conclusion as to the constitutionality of those conditions.

CONSTITUTIONALITY OF CONDITIONS AT THE UCJ

A. **Pretrial Detainees**

The population at the UCJ consists of both pretrial detainees and sentenced inmates, but pretrial detainees are in the majority. The Constitution requires different avenues of inquiry in evaluating the conditions under which these classes of persons may be confined. *Bell v. Wolfish, supra., 441 U.S. at 535. The Court stated in Wolfish* that pretrial detainees are protected by the Fourteenth Amendment against the deprivation of liberty without due process of law and they therefore have a right to be free from punishment prior to an adjudication of guilt. Thus, the test to be applied to the overcrowded conditions at the UCJ is whether they amount to the punishment of this group of inmates. *Wolfish, supra.*, 441 U.S. at 535; *see Lareau v. Manson*, 651 F.2d 96, 102 (2d Cir. 1981); *Lock v. Jenkins*, 641 F.2d 488, 491 (7th Cir. 1981); *Inmates of the Allegheny County Jail v. Pierce*, 612 F.2d 754, 758 (3d Cir. 1979).

A determination must be made as to whether the condition or restriction is "imposed for the purpose of punishment

or whether it is but an incident of some other legitimate governmental purpose." *Wolfish, supra.*, 441 U.S. at 538. The *Wolfish* Court further articulated this standard:

> Absent a showing of an expressed intent to punish on the part of detention facility officials, that determination generally will turn on "whether an alternative purpose to which (the restriction) may rationally be connected is assignable to it, and whether it appears excessive in relation to the alternative purpose assigned (to it)." *Kennedy v. Mendoza-Martinez*, 372 U.S. at 168-69; ...

441 U.S. at 538.

I concur with the Special Master's conclusions that there has been no express intent to punish the inmates at the UCJ on the part of either the defendants or the third-party defendant. The determination, then, of whether the conditions at the UCJ violate the constitutional rights of the pretrial detainees confined there must depend analysis of the reasons for and the reasonableness of those conditions. The Court in *Wolfish* considered the operation of a detention facility in a manageable fashion to be a "valid objective that may ... dispel any interence that (a) restriction (is) intended as punishment." 441 U.S. at 540-41 & n.23.

The restriction or condition at issue in this litigation is the severe overcrowding of the facility and the impact of the excess population on the provision of services and programs, especially recreation and visitation. The Special Master found that "the conditions caused by severe overcrowding, including cutbacks in inmate privileges and services, are an unavoidable incident of the jail officials' efforts to 'effectively manage' the facility during a statewide prison overcrowding emergency." SMR at 19. I would add that the interests of local and state governments in not releasing onto the streets either pretrial detainees who are not bail worthy or convicted inmates are legitimate ones that *may* justify the severely overcrowded condition at the UCJ. However, the due process rights of the pretrial detainees will have been violated

by this condition if it is excessive in relation to the legitimate interest sought to justify it.

Judged by this standard, I have determined that the Special Master correctly found that the due process rights of the pretrial plaintiffs have been violated. This conclusion does not mean that there is a "one man, one cell" principle engrafted onto the Fourteenth Amendment. *Wolfish, supra.*, 441 U.S. at 542. It is clear that the Supreme Court has not adopted a *per se* rule against double-celling. However, the Court has also not ruled that double-celling is *per se* constitutional.

> While confining a given number of people in a given amount of space in such a manner as to cause them to endure genuine privations and hardship over an extended period of time might raise serious questions under the Due Process Clause as to whether those conditions amounted to punishment, nothing even approaching such hardship is shown by this record.

441 U.S. at 542.

In *Wolfish*, a federally-operated short-term custodial facility in New York City, the Metropolitan Correctional Center ("MCC"), was the subject of the class action complaint. The MCC was opened in 1975 and it represented " 'the architectural embodiment of the best and most progressive penological planning.' " 441 U.S. at 525 (quoting the Court of Appeals). The Court examined the totality of the circumstances in determining that the pretrial detainees at the MCC did not endure genuine hardships. "The MCC differs markedly from the familiar image of a jail; there are no barred cells, dank, colorless corridors, or clanging steel gates. It was intended to include the most advanced and innovative features of modern design of detention facilities." 441 U.S. at 525.

The inmates at MCC are double-bunked in rooms measuring 75 square feet. The cells, while designed for single occupancy, have been furnished with double bunk beds in order to accommodate the excess population. While

37.5 square feet is an "admittedly rather small sleeping place", several factors brought it within tolerable limits: (a) imates are confined to the room essentially only during sleeping hours; (b) during the daytime hours they have free access to large common areas and hence do not depend upon the limited amount of space in the cell or exercise; and, (c) nearly all of the detainees are released within 60 days. *Wolfish, supra.*, 441 U.S. at 541-43 & n. 26.

As the Court in *Wolfish* stated, MCC differs markedly from traditional jails. The UCJ is a traditional jail. As outlined above, the cells at the UCJ have a floor space of 39 square feet inclusive of furniture and fixtures. Double-celling has been accomplished by placing a second mattress on the floor of the cell. While inmates are confined to these cells only during the night hours, during the daytime period they do not have open access to a large dayroom or common area. The cell corridors are narrow and necessarily overcrowded to the same extent that the cells are overcrowded. Recreation in the dayroom is available only in shifts and with the population at approximately 350, the staff has not been able to provide more than two hours of recreation per week.

The Special Master found that under these conditions the practice of double-celling was unconstitutional, particularly because of the use of floor mattresses but also because of the impact of overcrowding on recreational and visitation opportunities. The use of mattresses in the detention cells and in other areas of the UCJ was also considered to be unconstitutional by the Special Master. I shall first review his findings with respect to the use of mattresses. I shall thereafter consider the impact of overcrowding on recreation and visitation.

I agree with the Special Master that the use of floor mattresses constitutes punishment without due process of law in contravention of the rights of pretrial detainees. *See Lareau v. Manson, supra,; Vazquez v. Gray*, 523 F. Supp. 1359, 1365 (S.D.N.Y. 1981). The practice is unsanitary, dehumanizing, and shocking.

In *Lareau*, 651 F.2d at 105, the Second Circuit held that

the use of mattresses placed on the floor of a cell is "too egregious to warrant any ... leeway." The court considered the practice to be unconstitutional without regard to the number of days the practice continues. I do not agree that the caselaw supports a finding of *per se* unconstitutionality. Under the test articulated in *Wolfish, supra.*, 441 U.S. at 542, the period of time during which an inmate is subjected to genuine privation and hardship is relevant to a due process inquiry. The clearer the hardship, the shorter the period of time before it raises serious questions under the Due Process Clause.

With respect to the use of floor mattresses in the general population cells, detention cells or other areas of the UCJ, I find that such means are permissible only during an emergency and only if no detainee is so confined for a period longer than 48 to 72 hours. It would be preferable if collapsible cots were available at least for use in the library or laundry areas. If the defendants are confronted with an "emergency" of longer duration, they are instructed to comply with the other provisions of my order detailed below. (See Appendix B).

In a footnote, the Special Master restricted his consideration of the constitutionality of confining two detainees to a cell to the condition of using mattresses to accomplish "double-celling" and declined to reach the issue of "double-bunking.[1] The Commissioner, in his objections to the report of the Special Master, argued vigorously that double-bunking would remedy the unconstitutional conditions at the UCJ without the need to reduce the population immediately through the transfer of state sentenced prisoners. I specially ordered the parties to address the feasibility and constitutionality of double-bunking at the hearing on March 25, 1982.

The County complied with my request for supplemental briefing by stating that the bunks presently being used in the temporary dormitory cannot be utilized in the general population cells because of the height of the cells. I concur with the third-party defendant that this information is an in-

adequate response to my directions. The feasibility of other and different forms of bunk beds has not been addressed by the party most familiar with the structural properties of the UCJ. However, for purposes of my analysis under the Fourteenth Amendment, I shall assume that some form of double-bunking is possible.

There can be no doubt that using a double bunk bed is an obviously more sensible manner of providing a person with a place to sleep. However, the issue is still whether this solution passes muster constitutionally under all the conditions at the UCJ. In this Court's judgement it does not. In a detention facility with larger cells, the arguments of the third-party defendant would be quite plausible. Here, the cell space is, at most, paltry. While the use of a frame bed does mean that an inmate is not required to sleep on the floor next to the urinal, subject to sewage back-up, etc., it does not alter the spatial dimensions of living quarters. Furthermore, this Court must maintain its focus on the issue of whether the UCJ meets minimum standards of decency.

The stark reality is that, whether provided with bare mattresses or mattresses place on a frame, when the 39 square feet general population cells are share by two persons, each person has 19.5 square feet of space inclusive of furniture and fixtures for the period of lock-up at night. Double-bunking in the UCJ is therefore roughly equivalent to quadruple-bunking in the MCC at issue in *Wolfish*. Such spatial starvation cannot pass muster constitutionally. Even the incarcerated are entitled to something more than a walk-in closet.

Furthermore, there is no relief during the day from the adverse effects of overcrowding. As the Special Master found:

> The cell corridors and dormitories where the inmates spend the overwhelming majority of their waking hours are cramped, overcrowded and would allow little opportunity for free movement or exercise even at normal population levels. The pretrial detainees currently

> housed in general population cells or dormitories at the UCJ can do little more than watch television from 6:00 a.m. in the morning to 10:00 p.m. at night.

SMR, at 22. If I assume that only half of the cells on any one tier are to be double-bunked under the Commissioner's proposed remedy,[17] the average corridor space per person for daytime use will be between 15 and 21 square feet. Added to one person's share of the space of a double-bunked cell, a pretrial detainee at the UCJ is restricted nearly twenty-four hours a day to an area which the Court in *Wolfish* ruled was barely sufficient for sleeping purposes. It falls far short of the 105 square feet governing new prison construction in this state. *N.J.A.C.* 10A:31-2.8 (a) (4), (12).

Other courts have found jails with similar or more generous spatial dimensions than those in the UCJ unconstitutional. *See Lareau, supra,; Campbell v. Cauthron,* 623 F.2d 503 (8th Cir. 1980); *Heitman v. Gabriel,* 524 F. Supp. 622 (W.D. Mo. 1981); *Vazquez, supra.; Hutchings v. Corum,* 501 F. Supp. 1276 (W.D. Mo. 1980); *Benjamin v. Malcolm,* 495 F. Supp. 1357 (S.D.N.Y. 1980). Thus based solely on considerations of space, I find that double-celling or double-bunking at the UCJ subjects pretrial detainees to genuine hardships amounting to punishment in violation of the Fourteenth Amendment.

My decision does not rest upon an incorporation into the Due Process Clause of the various correction associations' recommendations with respect to the number of square feet appropriate for daytime space in a jail such as that contained in *N.J.A.C.* 10A:31-2, 8(a). *See Wolfish, supra.,* 441 U.S. at 543-44 n.27. However, the 30 to 40 square feet allotted to a double-bunked detainee is grossly inadequate in comparison to any of these professional standards.[18]

Furthermore, overcrowded cells cannot be examined for constitutionality in isolation from the overall circumstances in the facility. *Wolfish, supra.,* 441 U.S. at 525. In MCC, the hardships, if any, which are imposed upon pretrial detainees by double-bunking are mitigated by the unlimited daytime

access to the large common areas. In UCJ, the more serious privations are aggravated by the overcrowded corridors, and the lack of meaningful recreation and other necessities. (For the female inmates, there is a lack of any recreation.) What the Second Circuit stated in *Lareau* with respect to the detention facility in Hartford, Connecticut, is applicable here: "(T)here is no real respite for the double-bunked inmate from the pressures of overcrowding." 651 F.2d at 101.

As found by the Special Master, the County has been unable to provide the inmates with daily recreation off the tier. This is attributable to two factors. The recreation room has been reduced from 1,758 square feet to 720 square feet in order to erect a temporary dormitory for the men during the overcrowding emergency. In addition, the sheer size of the population has overburdened the staff and necessitated a shortening of the recreation time available to each inmate. Yet, recreation, as testified to by Gary Hilton, Assistant Commissioner of Corrections, before the Special Master, is one of the most important programs in a county jail setting for alleviating physical and mental stress.[19] Even if all of the tiers were single-celled, Mr. Hilton recommended that a committment should be made by the County to improve the off-tier recreation facilities.

The Commissioner proposes that elimination of the temporary dormitories for the men and women in conjunction with the establishment of a double-bunking practice would remedy any unconstitutional condition at the UCJ. I find this proposal to be unsatisfactory. It is doubtful that recreation will improve so long as the population is as high as it has been for several months even if the size of the recreation room is returned to its normal dimensions. The third-party defendant, in effect, is proposing a trade-off of one "genuine privation" for another. Either the pretrial detainees suffer increased crowding in the cells in order to enjoy slightly improved recreation opportunity or they suffer with the present recreation situation in order to enjoy slightly less crowded cells.[20]

Nor is access to a crowded corridor an adequate substitution for real exercise and recreation. The Special Master found the corridors sufficient only for passive activities, such as watching television. At the hearing, the Attorney General on behalf of the third-party defendant suggested, "The best recreation is walking. You can read that in every newspaper article about health and fitness." Transcript at 17. Yet, the Eighth Circuit in *Campbell v. Cauthron,* 623 F.2d 503, 507 (1980), in considering the constitutionality of the Sebastion County Jail, stated: "Merely allowing the inmates to walk around in the narrow corridor between cells does not provide adequate exercise." I agree, and it is evident that Assistant Commissioner Hilton does as well. While I appreciate the salutory effect of walking as an exercise, walking in the cramped corridors of the UCJ cannot satisfy the requirement of providing an inmate with a "healthy habilitative environment." *Battle v. Anderson,* 564 F.2d 388, 395 (10th Cir. 1977). By any reasonable standard, the provision for recreation and exercise at the UCJ at the present population level is woefully inadequate.

The overcrowded condition of the UCJ is the cause not only of inadequate recreation by also, as found by the Special Master, of reduced visitation privileges. This, too, aggravates the tensions already present because of double-bunking. As testified to by Assistant Commissioner Hilton, visitation has a very significant impact on the mental well-being of an incarcerated person.[21] Under the present circumstances, visits have been limited to five to ten minutes, if not indirectly discouraged altogether.[22]

I have determined that double-bunking at the UCJ violates the due process rights of pretrial detainees. It constitutes "confining a given number of people in a given amount of space in such a manner as to cause them to endure genuine privations and hardships over an extended period of time." *Wolfish, supra.,* 441 U.S. at 542.

B. **Sentenced Inmates**

In addition to pretrial detainees, there are confined at the

UCJ inmates already sentenced to county or state terms of imprisonment. Because these persons have been convicted, the Constitution does not protect them from all punishment but only from cruel and unusual punishment. *Rhodes v. Chapman, supra.* The Special Master found that the practice of sleeping sentenced inmates on mattresses in the general population cells, in the detention/isolation cells, and on the library or laundry floors violated the Eighth Amendment rights of those persons. He also found that sentenced inmates were deprived of adequate recreational opportunity to the same extent as pretrial detainees. *See Miller v. Carson,* 563 F.2d 741, 750 (5th Cir. 1977).

In *Rhodes, supra.*, the Court set forth the yardstick to be applied in measuring a prison condition under the Eighth Amendment:

> Today the Eighth Amendment prohibits punishments which, although not physically barbarous, "involve the unnecessary and wanton infliction of pain," ... or are grossly disproportionate to the severity of the crime ... No static "test" can exist by which courts determine whether conditions of confinement are cruel and unusual, for the Eighth Amendment "must draw its meaning from the evolving standards of decency that mark the progress of a maturing society."

452 U.S. at 346. (citations omitted).

At issue in *Rhodes* was the Southern Ohio Correctional Facility ("SOCF"), a modern maximum-security state prison. The Court reviewed the findings of the district court and concluded that they did not substantiate its ultimate finding of unconstitutionality. The cells of SOCF are 63 square feet and contain a bunk bed, night stand, sink with hot and cold running water, a sanitary toilet, and a wall-mounted shelf, cabinet and radio. They are heated and ventilated, and some even have a window that inmates can open and close. 452 U.S. at 341. In sum, as the Court stated, "though small, the cells at SOCF are exceptionally modern and functional." *Id.* at 349 n. 13.

As a result of double-celling at SOCF, job and educational opportunities had diminished "marginally". *Rhodes, supra.*, 452 U.S. at 348. However, it "had not reduced significantly the availability of space in the day rooms or visitation facilities." *Id.* at 342. In light of these findings, Justice Powell, writing for the Court concluded:

> The double celling made necessary by the unanticipated increase in prison population did not lead to deprivations of essential food, medical care, or sanitation. Nor did it increase violence among inmates or create other conditions intolerable for prison confinement.

Id. at 348.

Conditions at the SOCF obviously do not mirror conditions in older prisons which the Court stated "have justly been described as 'deplorable' and 'sordid.' *Bell v. Wolfish*, 441 U.S. at 562." *Rhodes, supra.*, at 352. When such conditions "alone or in combination ... deprive inmates of the minimal civilized measure of life's necessities," *Id.* at 347, and can be said to be cruel and unusual under contemporary standards of decency, federal courts must "discharge their duty to protect constitutional rights.' " *Id.* at 352.

The conditions of overcrowding and double-celling are not to be reviewed in isolation. Rather, provision of space must be viewed against the totality of conditions. *Rhodes, supra.*, 452 U.S. at 363 & n.10 (Brennan, J., concurring). *See also, Stewart v. Winter*, 669 F 2d 328, 335-36 (5th Cir. 1982); *Ruiz v. Estelle*, 666 F.2d 854, 858 (5th Cir. 1982); *Madyun v. Thompson*, 657 F.2d 868, 874 (7th Cir. 1981); *Hendrix v. Faulkner*, 525 F. Supp. 435, 524 (N.D. Ind. 1981).

I agree with the Special Master that requiring sentenced inmates to sleep for long periods of time on mattresses positioned on the floor constitutes cruel and unusual punishment. It is a "reprehensible and dehumanizing" practice. SMR, at 25. The practice deprives these inmates of the essential requirement of habitable shelter. As stated by the Tenth Circuit, shelter is a core area of concern under the Eighth Amendment and it goes beyond having a solid roof over one's head:

> In *Battle v. Anderson, supra.*, we upheld the district court's conclusion that "(i)t is incumbent on the incarcerating body to provide the individual with a healthy habilitative environment." 564 F.2d at 395. In affirming in *Battle*, we upheld the finding that 60 square feet of living space was the minimum amount of square footage which the Eighth and Fourteenth Amendments require that a state provide an inmate. *Id.* at 395, 397, 403. ... In short, a state must provide an inmate with shelter which does not cause his degeneration or threaten his mental and physical well-being. *Battle v. Anderson, supra.*, 564 F. 2d at 403.

Ramos v. Lamm, 639 F.2d 559, 568 (10th Cir. 1980), *cert. denied*, 450 U.S. 1041 (1981).

Even considering the incremental improvement in living conditions at the UCJ that would occur upon substituting bunk beds for mattresses, the stark reality is that 30 square feet of daytime space or 19.5 square feet of sleeping space fails to meet any contemporary standard of decency especially in light of the impact overcrowding has had on visitation, recreation, and time off the tier, as detailed above. *See, e.g., Lareau, supra,; Ramos, supra.; Ruiz, supra,; Smith v. Fairman*, 528 F. Supp. 186 (C.D. Ill. 1981). With regard to the detention/isolation cells, I agree with the Special Master that the cells can constitutionally accommodate two persons if each is provided with a bed. But the practice of housing three or four inmates on mattresses is deplorable and cannot be countenanced.

Although the standard against which the court must judge conditions imposed upon sentenced offenders is more stringent than that which guides the analysis of conditions of confinement of pretrial detainees, I find that the conditions at the UCJ are too egregious to satisfy either standard. Double-bunking, as practiced at the UCJ or as proposed, except in the detention/isolation cells, violates the Eighth Amendment as well as the Fourteenth Amendment.

In sum, I will accept the proposed conclusions of law of the Special Master, as modified by my consideration of the constitutionality of a double-bunking practice at the UCJ. I must now turn my attention to fashioning an appropriate remedy for these constitutional violations.

REMEDY

I am very mindful of the delicate balance established by the Constitution between federal and state governments. *See Rizzo v. Goode*, 423 U.S. 362, 378 (1976); *see also* O'Connor, *Trends in the Relationship Between the Federal and State Courts from the Perspective of a State Court Judge*, 22 Wm. & Mary L. Rev. 801 (1981). Especially in the area of prison administration, judicial restraint is necessary in order to ensure that the business of operating a state corrections system stays in the hands of persons most able to accomplish this difficult task. *Bell v. Wolfish, supra.*, 441 U.S. at 562.

These admonitions give a federal court pause to consider the implications of interfering in a local jail problem. Nevertheless it is a solemn duty of a district court to "scrupulously" observe whether there has been a constitutional failing in a challenged jail facility. *Wolfish, supra.; Procunier v. Martinez*, 416 U.S. 396 (1974). In *Procunier, supra.*, 416 U.S. at 405-06, the Court said:

> But a policy of judicial restraint cannot encompass any failure to take cognizance of valid constitutional claims whether arising in a federal or state institution. When a prison regulation or practice offends a fundamental constitutional guarantee, federal courts will discharge their duty to protect constitutional rights.

As I have determined that the UCJ as it is presently operated offends the fundamental guarantees of the Eighth and Fourteenth Amendments, I must complete the task required of me by the Constitution.

It has been noted previously that all the parties agree that the UCJ is seriously overcrowded and that the single most pervasive cause for this condition is the continued presence of state sentenced inmates. The confinement of state inmates in the UCJ is caused, in turn, by the valid and reasonable exercise of powers vested in the Commissioner under the Governor's Executive Orders. *Worthington v. Fauver, supra.*, 88 N.J. at 198. Consequently, the overburdened Union County facility, as detailed above has succumbed to other egregious conditions, such as the lack of meaningful recreation and visitation, and the lack of adequate living space, which undermine its habitability.

I have concluded on this basis that the environment at the UCJ is so degenerative and unhealthy as to be constitutionally impermissible. As the Executive Orders have contributed substantially to this unconstitutional situation, under the Supremacy Clause of the Constitution the Executive Orders as applied to the UCJ must yield. U.S. Const. Art. VI, cl.2. *See also Jacobson v. Massachusetts*, 197 U.S. 11, 25 (1905). The administrative action designating the UCJ as the place of confinement of state sentenced inmates is void and *NJSA* 2C:43-10(e) shall be given full force and effect.

This Court, however, is not unmindful of the good faith efforts of this administration and the previous administration to find a solution to the problem of overcrowding. *See, e.g.., Report of the Governor's Task Force on Prison Overcrowding*, December 3, 1981. Governor Kean has taken special note of this crisis. He indicated in his budget message, delivered on March 15, 1982, the State's role and its responsibility in the matter of insufficient county jail bedspaces:

> Our state problems have been passed down to the counties and in some cases even to our municipal jails. Go, as I have, to jails in counties like Essex, Passaic and Camden and you will see the results of our neglect. This budget provides us with the money to start to rectify this problem and place state prisoners into state custody where they rightfully belong.

It is obvious that the Chief Executive of the State is aware of the problem.

One of the measures which the Governor is taking in response to this emergency, in addition to seeking appropriations for new prison construction, is the execution of a lease with the United States Army for the use of the stockade at Fort Dix. At my request, Commissioner Fauver submitted an affidavit outlining the timetable for the transfer of inmates to Fort Dix, to be designated as the Mid-State Correctional Facility:

> I anticipate that I would be able to arrange for the placement of state inmates in the Mid-State Correctional Facility, commencing May 15 to May 31, at the rate of 80 per week, until the facility is filled with 500 inmates on or about approximately July 10.

Affidavit of William H. Fauver, filed April 5, 1982 §11. Hopefully this facility will go some of this distance toward rectifying the State's "neglect".

I am persuaded by the good faith representations of the third-party defendant that at least a temporary solution to the UCJ situation can feasibly be arranged by approximately June 15, 1982. Insofar as the State is acting with reasonable alacrity in this matter, I will stay the operation of *N.J.S.A.* 2C:43-10(e) as applied to the UCJ until July 1, 1982, rather than impose an overnight remedial order upon the parties. The stay will provide the State with sufficient leeway to enable it to administer the transfer of state sentenced inmates from the UCJ. Whether the measures proposed by the administration will suffice beyond the immediate moment and solve the long-run crisis of a burgeoning prison population should give the public pause, but it is not an issue properly before this Court. Nor does this Court have jurisdiction to order alternative relief in the form of, *e.g.*, parole guideline revisions. That clearly is the duty of the state legislature. My duty is to order speedy but fair relief for the plaintiffs to remedy the constitutionally impermissible conditions under which they are confined before the hot summer months ignite this tinderbox.

I have also determined that the County, which is primarily responsible for providing a constitutional jail, is not to be relieved of the consent judgment it voluntarily entered into except in one respect. Fed.R.Civ.P. 60(b)(6). That rule provides in pertinent part:

> On motion and upon such terms as are just, the Court may relieve a party of his legal representatives from a final judgment, order or proceeding for ... (6) any reasons justifying relief from the operation of the judgment.

On the motion to set aside the consent order, the County has the burden of proving that the order is too burdensome under circumstances that have significantly changed since the settlement was entered into. *See United States v. Swift & Co.*, 286 U.S. 106 (1932). Although *Swift* was decided prior to the enactment of the federal rules, it continues as the standard for equitable relief from a judgment. In *Swift*, the Court stated:

> There is need to keep in mind steadily the limits of inquiry proper to the case before us. We are not framing a decree. We are asking ourselves whether anything has happened that will justify us now in changing a decree. The injunction, whether right or wrong, is not subject to impeachment in its application to the conditions that existed at its making. We are not at liberty to reverse under the guise of readjusting. Life is never static, ... The inquiry for us is whether the changes are so important that dangers, once substantial, have become attenuated to a shadow. No doubt the defendants will be better off if the injunction is relaxed, but they are not suffering hardship so extreme and unexpected as to justify us in saying that they are the victims of oppression. Nothing less than a clear showing of grievous wrong evoked by new and unforeseen conditions should lead us to change

what was decreed after years of litigation with the consent of all concerned.

286 U.S. at 119.

The order being entered as a result of this decision relieves the County of a substantial burden. It in effect grants to the County the injunction on the third-party complaint sought by it prior to my appointment of the Special Master. Furthermore, circumstances have not changed significantly since the County entered into the stipulation of settlement. As stated by Judge Lasker in the Southern District of New York in a similar State prison-County jail context: "Moreover, the only circumstance which has changed - an increase in the population of the State's prison population - was entirely foreseeable in (October), 1981, and had been for a long period before that date." *Benjamin v. Malcolm*, 528 F.Supp. 925, 929 (1981).

Because I believe that the provision in the consent order requiring the County to close the doors to the UCJ as a "last-resort" measure is an unnecessarily intrusive and disruptive one, I will relieve the County of complying with it. In its stead, the County is directed to exhaust in good faith all other avenues of relief set forth in that order and then to seek relief in this Court.

As the County has not filed any objections to the report of the Special Master and as I have concurred in all material respects with the findings and conclusions of that report, the County shall be ordered to implement a medical screening program, to reinstate the recreation and visitation programs to prior levels, and to comply with *N.J.A.C.* 10A:31-3.13 (b) (5) regarding clean clothes and towels. I note the representations made by the County to the Special Master that lighting on the tiers will be improved and that additional medical and dental personnel will be hired.

One final remedial measure must be established: a maximum population capacity. While the Second Circuit has preferred a more flexible mechanism, *see Lareau, supra.*, the circumstances of the UCJ make it more appropriate to use a "cap". In this case, all the parties have either con-

sented to or admitted that the capacity of the UCJ is 238. *See* Letter from William H. Fauver to Judge DiBuono, dated February 20, 1981, SMR Appendix at 224. I find that the facts support a capacity figure of 259: 218 single general population cells, 26 in the "trustee/work release" dormitory, and 15 new intake cells. The detention/isolation cells with a double bunk in each are not included in the capacity because they are reserved for special administrative purposes. In light of my order directing the Commissioner to remove the state sentenced inmates by July 1, 1982, I find that the County should have until July 1, 1982, to implement the "cap" as a reasonable accommodation of all interests.

I will retain jurisdiction in order to monitor compliance with the order being entered on this decision. The Special Master is to report to the Court every sixty days until discharged. Defendant Colletti is to report on the County's actions pursuant to this order every sixty days until ordered otherwise. The report is to be served upon the parties, the Special Master, the Court, the County Prosecutor, the Board of Chosen Freeholders, and the assignment and criminal assignment judges of the County.

An order in conformance with this opinion has been filed by the Court.

Dated: April 27, 1982

FOOTNOTES

1. As reported by the Federal Bureau of Investigation, *Uniform Crime Reports: Crime in the United States*, September 10, 1981, at 38:

> The volume of Crime Index offenses in 1980 increased 18 percent over 1976 figures and 55 percent above those for 1971 ... From 1976 to 1980, violent crimes were up 33 percent and property crimes rose 16 percent.

Footnotes (Cont'd)

2. One very able spokesperson for this viewpoint is James Q. Wilson, *Thinking About Crime*, 172-73 (1975):

> (W)e would view the correctional system as having a very different function - namely, to isolate and to punish. It is a measure of our confusion that such a statement will strike many enlightened readers today as cruel, even barbaric. It is not. It is merely a recognition that society at a minimum must be able to protect itself from dangerous offenders and to impose some costs (other than the stigma and inconvenience of an arrest and court appearance) on criminal acts; it is also a frank admission that society really does not know how to do much else.
>
> The purpose of isolating - or, more accurately, closely supervising - offenders is obvious: Whatever they may do when they are released, they cannot harm society while confined or closely supervised. The gains from merely incapacitating convicted criminals may be very large ... If much or most serious crime is committed by repeaters, separating repeaters from the rest of society, even for relatively brief periods of time, may product major reductions in crime rates.

3. 23% more incarcerative sentences were imposed during the first six months of 1981 than during the comparable period in 1980. Steelman, "Overcrowding in New Jersey: No Easy Answers to a Crisis in Corrections", National Council on Crime & Delinquency 16 (1981).

4. The National Institute of Justice reports that the number of persons confined for more than one year increased almost 50% between 1972-1978. 2 National Institute of Justice, American Prisons and Jails 11 (1980).

Footnotes (Cont'd)

5. The population projections for the New Jersey prison complex show an increase of 38% from 1981 to 1982, and and increase of 150% from 1981 to 1985. By January 1990, 14,400 persons could be populating the state facilities.

> 6. After society has spent years and often a modest fortune to put just one person behind bars, we become bored. The media lose interest and the individual is forgotten. Our humanitarian concern evaporates. In all but a minority of the States we confine the person in an overcrowded, understaffed institution with little or no library facilities, little if any educational program or vocational training. I have visited American prisons built more than 100 years ago fc 800 prisoners, but with two thousand crowded today inside their ancient walls.

Remarks of Warren E. Burger, Annual Report to the American Bar Association (Feb. 8, 1981).

7. *See Rhodes v. Chapman*, 452 U.S. 337, 354 n.2 (1981) (Brennan, J. concurring) *citing* 3 National Institute of Justice, American Prisons and Jails 34 (1980).

8. N.Y. Times, Mar. 25, 1982, §A, at 16, col. 1, quoting Frank W. Wood, Warden of Minnesota Correctional Facility in Oak Park Heights.

9. The Office of Inmate Advocacy, counsel to the plaintiffs, was established as a part of the Office of the Public Defender, *N.J.S.A.* 52: 27E-10. The Public Defender has discretion to decide what clients the Office of the Inmate Advocacy will represent. *N.J.S.A.* 52:27E-12.

Footnotes (Cont'd)

10. The plaintiffs also included as defendants several judges of the New Jersey Superior Court. On August 5, 1981, the complaint was dismissed as against these defendants on the grounds that comity considerations precluded granting relief against judges who were not alleged to have directly and personally engaged in unconstitutional conduct. 519 F. Supp. 770 (D.N.J. 1981).

11. The stipulation of settlement sets the maximum capacity of the jail at 238 and allows the County defendants 90 days in which to implement the agreement. The measures to be taken whenever the capacity is exceeded include notification to municipal police agencies for retention of persons presently confined in the local lock-up facilities, notification to the Department of Corrections for removal of state sentenced inmates, and notification to this Court for a hearing. Pending a determination or other action to reduce the population, the jail administrators were required to refuse to admit persons brought to them.

12. On January 20, 1982, Governor Kean, in one of his first acts in office, extended the emergency executive action for an additional four months. Executive Order No. 1.

13. See Appendix A *infra*.

14. Hon. Worrall F. Mountain is a retired justice of the New Jersey Supreme Court. He served on that bench from 1971 until his retirement in June of 1979. Justice Mountain recently participated as a member of Governor Byrne's Task Force on Prison Overcrowding. I wish to express my deep appreciation for his excellent service as Special Master in this matter.

15. The Special Master found that 15 new intake cells would increase the maximum capacity to 259 when they become operational even though they were not designed as general population cells. SMR at 29-30.

Footnotes (Cont'd)

16. None of these parties has testified, or otherwise suggested, that it would be feasible to equip the 39 square foot general population cells at the UCJ with two beds. I make no ruling on the feasibility or constitutionality of such a practice since that question was not raised in the record before me.

SMR at 28 n. 19.

17. This premise is reasonable when based on a population at the UCJ of at least 359 because, assuming I order the elimination of the temporary dormitories and I restrict the detention cells to no more than double occupancy as recommended by the Special Master, 115 out of the 218 general population cells would have to be double-celled. On the day the Special Master toured the UCJ, three tiers were totally double-celled, restricting these inmates to less than 15 square feet of corridor space.

18. For a summary of the recommendations of various commissions, courts and professional organization, see 3 National Institute of Justice, American Prisons and Jails 2-7 (1980). The recommendations range from 50 to 80 square feet per inmate. Approximately 88% of local jails, according to the National Jail Census, have at least 40 square feet of floor space. 1 National Institute of Justice, American Prisons and Jails 83 (1980).

19. Transcript of Proceedings, Feb. 18, 1982, at 61-62:

> Mr. Hilton: In the county jail if you were to rate some things that I see as significant the terms of, you know, setting aside food and medical and those things — I think access to a telephone is an extremely significant factor in terms of maintaining mental health.
> The fact that, you know, you don't have — are

Footnotes (Cont'd)

> not able to call. That is a tremendous psychological thing. Visits, recreation and an act of the Public Defender Program, where lawyers are in the place, they are seen and they answer telephone calls and don't put inmates off with, "I am in Court," or something like that.
> I think they are the four things that make a county jail tolerable.

20. The impact of double-celling has been greatest on the pretrial detainees. Of the 162 inmates subject to double-celling on February 24, 1982, 142 were pretrial detainees. SMR at 8 n. 6. This degree of double-celling occurred even though there has been established at the UCJ two temporary dormitories in the former recreation spaces. Recreation and housing in the UCJ are flip sides of the same coin.

United States District Court
District of New Jersey
Civil No. 81-863

UNION COUNTY JAIL INMATES,
TIMMIE LEE BARLOW, et al.,

Plaintiffs

v.

JAMES SCANLON, THOMAS
JEFFERSON, etc. et al.,

Defendants

v.

WILLIAM H. FAUVER, Commissioner
Department of Corrections,

Third-Party Defendant

ORDER

Filed
April 27, 1982

This matter having come before the Court on the motion of the third-party defendant, William H. Fauver, Commissioner, Department of Corrections, for a hearing on objections to the Special Master's Report filed February 26, 1982, pursuant to Fed.R.Civ.P. 53, and said hearing having been held on March 25, 1982; and

The Court having considered the Report of the Special Master, the objections of the parties, supplemental briefs and affidavits, and for the reasons expressed in its opinion of April 27, 1982,

It is on the 27th day of April, 1982, ORDERED that the findings of fact of the Special Master be adopted and that the Union County Jail be declared unconstitutionally overcrowded; and

It s further ORDERED that:

(1) On or before July 1, 1982, the third-party defendant is to remove any and all inmates incarcerated at the Union County Jail who as of fifteen (15) days prior to that date have been sentenced to terms of imprisonment in state facilities; and

(2) The third-party defendant from that date forward shall fully comply with N.J.S.A. 2C:43-10(e) with respect to persons who are or shall be incarcerated at the Union County Jail; and

It is further ORDERED that the Consent Judgment approved by this Court on October 22, 1981, continue in full force and effect, except as modified or supplemented as follows:

(a) The defendants shall, pursuant to N.J.A.C. 10A:31-3.16(b)(10), provide at least one hour of recreation daily to each inmate;

(b) The defendants shall reinstitute a program of at least three one-quarter hour visitation periods per week;

(c) The defendants shall implement a medical screening program for new admittees;

(d) The defendants shall provide clean clothing weekly and clean towels daily to all inmates in accordance with N.J.A.C. 10A:31-3.13 (b) (5).

(e) The defendants shall not place more than two (2) inmates in any of the detention/isolation cells.

(f) The maximum capacity of the Union County Jail is, until it is enlarged, replaced or modified, two hundred fifty-nine (259), specifically to include on (1) person in each general population cell, twenty-six (26) persons in the "trustee/work release" dormitory, and one (1) person in each intake cell;

(g) The defendants shall have until July 1, 1982, to reduce the population at the Union County Jail to the maximum capacity;

(h) In addition to the other mechanisms required to be used under the Consent Judgment whenever the population has exceeded the maximum capacity for more than seventy-two (72) hours, the defendants shall after July 1, 1982, notify the Department of Corrections to remove any state prisoners who have remained at the facility beyond the statutory fifteen (15) day period since sentence was imposed, and shall notify the Board of Chosen Freeholders of the necessity to make other arrangements for the housing of the excess number of county inmates and pretrial detainees;

(i) The defendants shall further notify the parties to this action and this Court if either the Department of Corrections or the Board of Chosen Freeholders fails to act upon these notifications within two weeks, whereupon the Court shall take such actions as are consistent with and which will effectuate the Court's findings of fact and conclusions of the law in its opinion filed this date; and

(j) The defendants shall not refuse to admit any persons lawfully brought to them, and any agreement to do such in the Consent Judgment entered on October 22, 1981, shall be null and void.

It is further ORDERED that no person who is or shall be incarcerated at the Union County Jail be required to sleep on a mattress placed on the floor of any cell or in any other area of the facility for longer than seventy-two (72) hours, after which time he or she shall be assigned to a single cell for at least two weeks, unless released or transferred sooner.

It is further ORDERED that defendant Coletti complete a report every sixty (60) days setting forth the weekly population figures for the preceeding sixty day period, and the extent and means of compliance with this Court's order, and shall serve such report upon this Court, the Special Master, plaintiffs' counsel, County counsel, the Commissioner of Corrections, the Board of Chosen Freeholders, the County Prosecutor, the Assignment Judge of Union County, and the Criminal Assignment Judge of Union County.

It is further ORDERED that the Special Master shall monitor compliance by the defendants and the third-party defendant with the orders of this Court.

Jurisdiction is retained.

HAROLD A. ACKERMAN, U.S.D.J.

UNITED STATES COURT OF APPEALS

FOR THE THIRD CIRCUIT

NO. 82-5310

UNION COUNTY JAIL INMATES, TIMMIE LEE BARLOW, ELBERT EVANS, JR., RAYMOND SKINNER, JAMES WYSOCKI, on behalf of themselves and all other persons similarly situated

v.

V. WILLIAM DI BUONO, Assignment Judge; JOSEPH G. BARBIERI, Criminal Assignment Judge; CUDDIE E. DAVIDSON, JR., Bail Judge; as Representatives of the Judges of the Criminal Courts of Union County; RALPH FROELICH, Union County Sheriff; JAMES SCANLON, Jail Administrator; THOMAS HEFFERSON, Jail Warden; ROSE MARIE SINNOT, Chairman, Board of Chosen Freeholders; GEORGE ALBANESE, County Manager; and their Successors in Office, in their official capacities, Randolph Pisane and Louis J. Coletti

v.

WILLIAM H. FAUVER, Commissioner, Department of Corrections, State of New Jersey, and his Successor in his official capacity

William H. Fauver, Commissioner,
New Jersey Department of Corrections,

Appellant

SUR PETITION FOR REHEARING

Present: SEITZ, *Chief Judge*, ALDISERT, ADAMS, GIBBONS, HUNTER, WEIS, GARTH, HIGGINBOTHAM, SLOVITER and BECKER, *Circuit Judges* and WEBER, *District Judge*

Honorable Gerald J. Weber, United States District Judge for the Western District of Pennsylvania, sitting by designation.

The petition for rehearsing filed by appellees, Union County Jail Inmates, Timmie Lee Barlow, Elbert Evans, Jr., Raymond Skinner, James Wysocki, on behalf of themselves and all other persons similarly situated, in the above entitled case having been submitted to the judges who participated in the decision of this court, and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court in banc, the petition for rehearing is denied.

Judges Gibbons, Higginbotham and Sloviter would grant the petition for rehearing.

Judge Gibbons' statement sur denial of petition follows.

By the Court

Leonard I. Garth
Circuit Judge

DATED: October 5, 1983

UNITED STATES COURT OF APPEALS

FOR THE THIRD CIRCUIT

NO. 82-5310

UNION COUNTY JAIL INMATES, TIMMIE LEE BARLOW, ELBERT EVANS, JR., RAYMOND SKINNER, JAMES WYSOCKI, on behalf of themselves and all other persons similarly situated

v.

V. WILLIAM DI BUONO, Assignment Judge; JOSEPH G. BARBIERI, Criminal Assignment Judge; CUDDIE E. DAVIDSON, JR., Bail Judge; as Representatives of the Judges of the Criminal Courts of Union County; Ralph Froelich, Union County Sheriff; JAMES SCANLON, Jail Administrator; THOMAS HEFFERSON, Jail Warden; ROSE MARIE SINNOT, Chairman, Board of Chosen Freeholders; GEORGE ALBANESE, County Manager; and their Successors in Office, in their official capacities, Randolph Pisane and Louis J. Coletti

v.

WILLIAM H. FAUVER, Commissioner, Department of Corrections, State of New Jersey, and his Successor in his official capacity

ORDER

IT IS ORDERED that this Court's order filed on October 5, 1983, denying rehearing in banc in the above-captioned matter is amended to add the following statement following the paragraph beginning "Judge Gibbons, Higginbotham and Sloviter ..." but before the paragraph beginning "Judge Gibbons' statement sur denial ..."

"Judge Weis votes for rehearing but does not join in Judge Gibbons' opinion."

By the Court,

Leonard I. Garth

Circuit Judge

Dated: October 6, 1983

GIBBONS, *Circuit Judge*, dissenting from the denial of a petition for rehearing, with whom, Higginbotham and Sloviter, Circuit Judges join:

The Office of Inmate Advocacy of the New Jersey Public Advocate-Defender,[1] petitions for rehearing of a decision of this court which substantially reversed all of the relief ordered by the district court in an action challenging the constitutionality of conditions of confinement in the Union County, New Jersey Jail.[2] The minimum standards announced in the panel opinion for conditions of pretrial detention and post conviction confinement in this circuit are more severe than any that have been tolerated in any other locality in the United States.[3] Indeed those standards, considering that we are dealing with the treatment of human beings, compare

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1. The New Jersey Public Advocate-Public Defender is a cabinet level state officer charged with a variety of public functions, N.J. Stat. Ann. 52:27E -1 to -47 (West Supp. 1983-1984). New Jersey law creates, in the Office of the Public Defender, the Office of Inmate Advocacy. N.J. Stat. Ann. 52:27E-10 (West Supp. 1983-1984). That office is charged with the responsibility of representing the interests of inmates in jails, prisons, penitentiaries and similar facilities in New Jersey N.J. Stat. Ann. 52:27E-12 (West Supp. 1983-1984).

2. The district court opinion is reported. Union County Jail Inmates v. Scanlon, 537 F. Supp. 993 (D.N.J. 1982).

3. *See* Lareau v. Manson, 651 F.2d 96 (2d Cir. 1981); Lock v. Jenkins, 641 F.2d 488 (7th Cir. 1981); Jones v. Diamond, 636 F.2d 1364 (5th Cir. (en banc)), *cert. dismissed sub. nom.* Ledbetter v. Jones, 453 U.S. 950 (1981); Campbell v. Cauthron, 623 F.2d 503 (8th Cir. 1980); Fischer v. Winter, 564 F. Supp. 281 (N.D. Cal. 1983), Martino v. Carey, 563 F. Supp. 984 (D. Ore. 1983); Campbell v. McGruder, 554 F. Supp. 562 (D.D.C. 1982), *on remand from* 580 F.2d 521 (D.C. Cir. 1978); McMurry v. Phelps, 533 F. Supp. 742 (W.D. La. 1982); Vasquez v. Gray, 523 F. Supp. 1359 (S.D.N.Y. 1981); Hutchings v. Corum, 501 F. Supp. 1276 (W.D. Mo. 1980); Benjamin v. Malcolm, 495 F. Supp. 1357 (S.D.N.Y. 1980).

unfavorably with the standards mandated by federal law for the treatment of animals.[4] Common human decency demands that the panel opinion be reconsidered by the full court. Moreover in arriving at a grossly inhumane and indecent result, the panel chose to disregard both the strictures of Fed. R. Civ. P. 53(e) (2) with respect to findings of fact made by a master, and the appropriate deference which should be accorded to the trial court in fashioning injunctive relief for past and threatened violations of the basic human liberties protected by the fourteenth amendment. Thus I dissent from the denial of the petition for rehearing.

I.

The Master's Findings

The Public Advocate's complaint seeks preliminary and permanent injunctive relief for all actions which confine inmates of the Union County Jail in such conditions of overcrowding as to deprive them of constitutionally protected rights. Hon. Harold A. Ackerman, the district court judge to whom the complaint was assigned, pursuant to Rule 53, on January 29, 1982 appointed Hon. Worrall F. Mountain as Special Master.[5]

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4. *See* Animal Welfare Act, 7 U.S.C. §§ 2131-2156 (1976); Cruelty to Animals Act, 45 U.S.C. §§ 71-74 (1976); implementing regulations, 9 C.F.R. §§ 1-4 (1983).

5. The Special Master, a former Justice of the Supreme Court of New Jersey, is particularly well qualified for that position. The district court judge is also particularly knowledgeable about the conditions of the Union County Jail, having served for many years in Union County as Judge of the New Jersey Superior Court.

That rule provides that "(i)n an action to be tried without a jury the court shall accept the master's findings of fact unless clearly erroneous." Fed. R. Civ. P. 53(e) (2). A court functioning in a reviewing capacity cannot make individualized findings which the master who heard the testimony did not make. *Bennerson v. Joseph*, 583 F.2d 633, 641 (3d Cir. 1978). A reviewing court commits reversible error in failing to accept findings of a master which are not clearly erroneous. *Anderson v. Mt. Clemens Pottery Co.*, 328 U.S. 680, 689 (1946). "The findings of a master, to the extent that the court adopts them, shall be considered as the findings of the court." Fed. R. Civ. P. 52(a). As such, they are insulated, in the Court of Appeals, by the clearly erroneous standard of Rule 52. Thus there is no warrant in the law for factfinding in this court.

The material facts found by the master with respect to the Union County Jail facility are as follows:

> The UCJ is an aging eight store detention facility located in the heart of Elizabeth, New Jersey. It is designed to house for short periods of time, pretrial detainees and convicted individuals sentenced, in Union County, to prison terms of less than one year. *N.J.S.A.* 2C:43-10.
>
> The prison contains 218 "general population" cells which are spread throughout 19 "tiers" or cellblocks on the third through fifth floors of the facility. Each cell is equipped with a single bed and a combination toilet/sink fixture and all but two of them measure approximately 39 square feet in area.[3] The general

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3. Two remaining cells, one in A tier and the other in B tier, provide approximately 47 square feet of living space.

population cells on each tier open into a common area known as the "cell corridor" which is approximately 5½ feet wide and varies in length from 40 feet to 70 feet depending upon the number of cells in a given tier.[4] It is in this area that the inmates spend the overwhelming majority of their waking hours.

Inmates are locked in their cells between 10 p.m. and 6 a.m.; at all other times of the day they are permitted access to the cell corridor. Each cell corridor is equipped with one television set and one telephone. There are no lights in the cells or the cell corridors — the only illumination in these areas comes from the lights in the "officer's corridor" which runs parallel to the cell corridor and is separated from it by iron bars. The County concedes that lighting on the tiers could be improved and I have been informed that steps are being taken to that end.

In addition to the general population cells, there are currently three dormitories, two of them temporary, that are being used to house inmates. The "trustees/work release" dormitory on the first floor of the jail consists of two rooms separated by a wire mesh fence. The trustee side measures approximately 595

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4. Twelve of the tiers contain twelve cells each and the cell corridor in each of these tiers measures approximately 5½ feet by 60 feet or 330 square feet. Five tiers contain eight cells per tier and the cell corridor in these tiers are approximately 5½ feet by 40 feet or 220 square feet. The remaining two tiers contain seventeen cells each and the cell corridors are approximately 5½ feet by 70 feet or 385 square feet.

App. at 66-69.

square feet and the work release side is approximately 513 square feet in area. The two rooms, combined, currently are capable of housing approximately 26 inmates on single and double bunk beds.

A portion of the men's exercise area has been converted into temporary dormitory use. This area, which is separated from the recreation area by a wire mesh partition, measures approximately 1,038 square feet and is capable of housing approximately 26 to 28 inmates. A second temporary dormitory has been constructed in what was formerly the women's recreation area adjacent to the women's tier on the fifth floor. This area measures approximately 374 square feet and is capable of housing approximately eight women. Inmates housed in the two male dormitories (except "trustees") spend the vast majority of each day confined to the dormitory area. The women housed in the temporary women's dormitory, for security reasons, spend their waking hours locked in the cell corridor on the women's tier with all other women prisoners.

In addition to the general population cells, there are ten detention/isolation cells at the UCJ ranging in size from 83 square feet to 113 square feet. These cells are used to house inmates guilty of disciplinary infractions or inmates in need of isolation, e.g., for medical reasons. Each cell contains a single bed and some are equipped with toilet fixtures.

The quoted findings describe a facility designed to hold 218 general population inmates, on a short term basis; so short that no provision was made in the cellblocks for il-

lumination which would permit the inmates to read. In addition to the designed capacity of 218 general population inmates, the "trustees/work release" dormitory houses 26 inmates. Thus arguably the facility's designed capacity is as high as 244 inmates. By converting the men's exercise area and the women's recreation area to dormitory space, the County has increased the capacity to 278 inmates.

The material facts found by the master with respect to inmate population, as contrasted with capacity, are as follows:

> In recent months, the daily population of the UCJ has averaged well over 300 inmates. The population on the day I toured the facility, February 8, 1982, was 350 inmates, 92 of whom were awaiting transfer to state prisons. On February 15, 1982, the population had risen to 359, 81 of whom have been sentenced to and are awaiting transfer to state facilities.[5] Of the 359 inmates housed at the UCJ on February 15, 1982, 196 had been there for 45 days or more and 131 had been there for at least 75 days. Of the 131 inmates housed for 75 days or more, 57 were state sentenced prisoners. As of February 15, 1982, 206 pretrial detainees were being held at the UCJ.
>
> Despite extensive efforts by the defendant, County, to create sufficient bed space to handle the overflow of prisoners, jail administrators simply have been able to create suitable housing for all inmates. For the past

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5. I have been informed that as of February 24, 1982, the total inmate population at the UCJ was 385. Of that total, 101 were awaiting transfer to a state correctional institution.

several months, the County has been forced to "double cell" inmates on the general population tiers. Since there is only one bed in each of the individual cells, double celling requires that one inmate sleep on a mattress placed on the floor at night. This second mattress, measuring approximately 16 square feet, must be placed adjacent to the toilet in the cell. It occupies virtually all of the otherwise free floor space in the cell. The parties agree that some inmates have been double celled for extended periods of time (several weeks). Further, it is agreed that the overwhelming majority of inmates subjected to the double celling practice have been pretrial detainees.[6]

Double celling of large numbers of inmates in the UCJ has resulted in a serious reduction in the amount of square footage available per inmate, both in the cells themselves and in the cell corridors. With respect to the individual cell conditions double celling, of course, requires that two inmates share a total of 39 square feet of space for approximately eight hours per night. During the day, the average square footage per inmate is somewhat higher because during daytime hours inmates have access to their cells and the cell corridor. Depending upon the extent of double celling on any given tier at a particular point in time, however, the average square footage per inmate during daytime hours is still very low.

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6. Out of a total of 162 inmates being double celled in general population cells on February 24, 1982, approximately 142 were pretrial detainees.

For example, in each tier with twelve individual cells, the combined square footage of the cells and the cell corridor is approximately 798 square feet.[7] Thus, when those tiers are operating at normal maximum levels (one inmate per cell) there exists approximately 67 square feet of "daytime" space per inmate which includes the beds and toilet/sink fixtures. In each tier with eight cells, the daytime figure is approximately 66 square feet per inmate and in the two tiers with seventeen cells that figure is approximately 62 square feet per inmate. When double celling is practiced in one-half of the cells in any 12-cell tier, the square footage available per inmate during daytime hours is reduced by one-third, to approximately 45 square feet (44 square feet in

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7. The combined square footage figure is calculated as follows:

cell corridor; 60 ft. x 5.5 ft.	=	330 sq. ft.
12 cells; 12 x 39 ft.	=	568 sq. ft.
		798 sq. ft.

The square footage of the cells and cell corridor in each of the 8-cell tiers is approximately 530 sq. ft. calculated as follows:

cell corridor; 5.5 ft. x 40 ft.	=	220 sq. ft.
8 cells; 8 x 39 sq. ft.	=	312 sq. ft.
		532 sq. ft.

The square footage of the cells and cell corridor in the 17-cell tiers is approximately 1,057 sq. ft. calculated as follows:

cell corridors; 70 ft. x 5.5 ft.	=	385 sq. ft.
16 cells; 16 ft. x 39 ft.	=	624 sq. ft.
one cell; 1 ft. x 47 ft.	=	47 sq. ft.
		1056 sq. ft.

the tiers with 8 cells; 41 square feet in the tiers with 17 cells). When double celling is present throughout all cells in a 12-cell tier, the square footage per inmate during daytime hours is reduced to 33.5 square feet (33 square feet in 8 cell tiers; 31 square feet in 17 cell tiers).[8] For purposes of comparison, it is noted that the New Jersey administrative regulations governing new prison construction provide that all future single occupancy cells shall be not less than 70 square feet in area and further provide that separate day rooms containing 35 square feet per inmate shall be constructed in each new jail. *N.J.A.C.* 10A:31-2.8(a) (4) (12). Thus, current New Jersey regulations suggest that the "ideal" square footage per inmate housed in a county jail should be approximately 105 square feet.[9]

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8. As of February 24, 1982, there was "total" double celling on 3 tiers, the A and B tiers (34 inmates in each 17-cell tier) and the women's tier (24 inmates in a 12-cell tier). When total double celling is present throughout the women's tier, as was the case on February 24, 1982, female inmates at the UCJ actually have even less average square feet per inmate during daytime hours than indicated in the text for the typical 12-cell tier. The reason is that all women housed in the female dormitory are moved into the sole women's cell corridor during daytime hours for security reasons. This further exacerbates the overcrowding conditions in the women's cell corridor. On February 24, 1982, for example, 32 women were being housed on the tier during daytime hours. Thus, the average square footage per inmate was a paltry 25 feet.

9. While the United States Supreme Court in *Bell v. Wolfish* stated that statistics similar to those found in *N.J.A.C.* 10A:31-2.8 "do not establish the constitutional minima" for average square footage per inmate, the Court did acknowledge that they "may be instructive in certain cases". 441 U.S., at 542, n. 27, 60 L.E.D. 2d 471 (1979).

In addition to the extensive use of double celling provoked by the overcrowding problem, when the UCJ population reaches the 365-370 figure, jail officials are forced to require some inmates to sleep on mattresses placed on the floor in places such as the laundry area and the law library area. These inmates must continue to sleep on mattresses until there is a drop in the population count or until released or sent to another facility. It is undisputed that some inmates might be required to sleep on mattresses laid on the floor in various parts of the jail for extended periods of time.

The overcrowding conditions in the detention/isolation cells at the UCJ are the most serious in the jail. As of February 8, 1982, there were a total of 32 inmates being housed in ten detention/isolation cells for a variety of disciplinary reasons.[10] Some of these cells currently are being used to house as many as four inmates for extended periods of time. Since each detention cell is designed to hold only one inmate and is equipped with but a single bed, as many as three inmates have been forced to sleep on mattresses laid on the floor of the cells. In cells with three or four prisoners, these mattresses take up a very large percentage of the floor space. There are no cell corridors in the detention cell area and, thus, detention inmates are forced to spend all but a few hours a week confined to the cell itself.[11] Some of the detention cells are equip-

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10. One inmate was being housed in isolation for medical reasons. Thus, 31 inmates were sharing the nine other detention cells.

11. Detention cell inmates currently are permitted to enjoy the limited recreation and visitation privileges available to general population inmates. *See infra* 12-16.

ped with a toilet/sink fixture and group showers are provided to detention/isolation inmates daily.

These findings establish that the inmate population has at times reached the point where female inmates have been allotted 25 square feet of living space (less space for toilet, washstands and bunks), and male inmates have been allotted 33.5 square feet (less space for toilets, washstands and bunks). Since a mattress measures 16 square feet, a bunk must occupy at least that much space. A toilet and washstand large enough to be functional for adults must occupy at least another two square feet. Thus the master's findings establish that women inmates have at times been allocated as little as 7 square feet of space in which to function over protracted periods, and men inmates as little as 15.5 square feet.[6] The absence of illumination in the cells suggests that

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6. Federal regulations for the humane treatment of nonhuman primates provide:
Space requirements. (1) Primary enclosures shall be constructed and maintained so as to provide sufficient space to allow each nonhuman primate to make normal postural adjustments with adequate freedom of movement.
(2) Each nonhuman primate housed in a primary enclosure shall be provided with a minimum floor space equal to an area of at least three times the area occupied by such primate when standing on four feet. 9 C.F.R. § 3.78(b) (1983). Federal regulations for humane treatment of certain other warm blooded animals provide: Enclosures shall be constructed and maintained so as to provide sufficient space to allow each animal to make normal postural and social adjustments with adequate freedom of movement. Inadequate space may be indicated by evidence of malnutrition, poor condition, debility, stress, or abnormal behavior patterns
9 C.F.R. § 3.128 (1983). *See also* 9 C.F.R. § 3.104 (space requirements for humane treatment of marine mammals). The conditions of crowding for human beings found by the master would, if imposed on animals, violate federal law.
A typical federal judge's desk top is approximately 22 square feet.

even staying in bed all day to read is not a viable alternative.

The material facts found by the master with respect to the effects of the overcrowding which he found are as follows:

> The severe overcrowding conditions outlined above have had an adverse impact on numerous aspects of the inmates lives. The overcrowding has severly taxed the County's available resources and make it impossible for it to continue to comply with certain state regulations governing the operation of county jails. One of the most serious cutbacks has occurred in the area of inmate recreational privileges. *N.J.A.C.* 10A:31-3.16(b) (10) provides that inmates housed in county jails are to be "permitted at least one hour of physical exercise and recreation each day outside the housing unit." Due to the large inmate population and the reduction in the size of the men's recreation area, prison officials have been forced to limit male recreation privileges to no more than one hour periods, twice per week. I note that the recreational equipment available to male prisoners is extremely limited consisting primarily of a ping-pong table and a weight machine. Under existing conditions, I find that there is almost no realistic opportunity for male inmates to enjoy recreation while confined at the UCJ. Further, the total elimination of what was formerly the women's recreation area has resulted in the suspension of *all* recreational privileges for women. The absence of a meaningful opportunity for the male and female inmates housed at the UCJ to enjoy physical exercise is particularly disturbing in view of the conditions of inmates confinement in the cell corridors. (citation ommitted).

Another inmate privilege sharply curtailed as a result of the overcrowding problem is visitation privileges. The former visitation policy permitted inmates to visit with family and friends, for anywhere from fifteen minutes to one-half hour, three times per week. As a result of the sheer volume of visitors arriving at the UCJ on visitation days, the County has been forced to limit the time for each visit to a maximum of five to ten minutes. Even with this shortening of visitation time, jail officials are not always able to accommodate the large number of visitors.

A second area in which I find that the County has been unable to comply with State regulations is with regard to the provision of clean clothing to inmates. *N.J.A.C.* 10A:31-3.13(b) (5) requires that inmates be provided with a complete change of clothing at least once weekly and that clean towels be provided daily. While jail officials stated that they have made every effort to comply substantially with this regulation, I am persuaded by the several affidavits submitted to me by the inmates that there has not been complete compliance. There have been allegations that some inmates have been required to wear the same clothing for periods of several weeks or more. I find that the County's inability to comply with this important regulation is entirely attributable to the overcrowding conditions.

I find that the provision of other services to inmates has been curtailed and/or delayed as a result of the prison overcrowding. Prison officials continue to provide the inmates with counseling programs, chapel services,

educational activities, access to the general library and law library, and other related programs, but the staffing available to administer these various programs is limited and officials admit that they have encountered problems in administering these services.

I find that the sanitary conditions of the inmate housing areas and the kitchen are satisfactory. The food service is adequate and I note that both the inmates and the corrections officers eat the same diet from the prison kitchen. I find that the provision of medical and dental services to inmates is adequate except in one important respect. County officials acknowledge that new inmates are not given a complete physical examination at the time of commitment. Officials from the State Department of Corrections testified that the absence of such a program could pose a serious health risk to the inmates and I share those views.

There is no question that the overcrowding situation has resulted in an increase in scattered instances of inmate fighting, etc., at the UCJ. County officials testified that there was a recent stabbing incident in one of the cells, which arose from a dispute between double celled inmates as to which inmate was going to sleep on the mattress laid on the floor. I do not find, not do any of the parties assert, that the increased tensions in the jail amount to a serious security problem at the present time. I think it bears noting, however, that all parties believe that, if the current overcrowding conditions carry over into the hot summer months, an extremely volatile situation will be presented.

App. at 74-78.

These findings establish that the female inmates spend protracted periods deprived of all recreation opportunities, that male inmates fare little better with respect to recreation, that both men and women are afforded few visitation privileges, have been deprived of sanitary clothing, have had access to reading material terminated, have been exposed to the risk of transmitting infectious diseases, and in some instances have been forced to sleep on mattresses on the floor in inappropriate locations, *all as a result of overcrowding*. No wonder, then, that the master also found that overcrowding has already resulted in an increase in scattered instances of inmate fighting, etc., but that conditions of overcrowding creates a risk of other more serious problems involving violence.

The Master concluded that the conditions described in these finding violated the fourteenth amendment, and recommended, among other steps a reduction, over a reasonable period, of the inmate population to its actual capacity of 244, preferably by removing sentenced inmates to state facilities. App. at 93. That recommendation tacitly rejected the testimony of certain state officials that the Union County Jail could with certain adjustments actually house 369 inmates.

II.

The State Defendants' Objections to the Master's Report

The Objections to the Master's Report filed by the Attorney General did not take serious issue with the facts found by Justice Mountain. Indeed the Attorney General observed:

> As has been true throughout these proceedings, there is no significant controversy between the parties as to most of the essential facts in the case with certain exceptions which will be set forth herein. The dispute bet

> ween the parties has focused (and continues to focus) on the legal conclusions drawn from underlying facts, and assuming arguendo, that the operations of the Union County Jail are deficient in some respects, from a constitutional standpoint, what the appropriate remedies are - the Special Master's proposed conclusions of law and his recommendations.

App. at 102. The "certain exceptions" referred to in the Objections to the Master's Report dealt for the most part not at all with the facts as to the facilities, the population, and the consequences of housing that population in those facilities. They dealt only with the recommendation that the population be reduced. It was the Attorney General's position that the Master should have accepted his expert's testimony "that with certain space adjustments, the jail could actually house 369 inmates without the necessity of double-celling and at the same time achieving recreation for inmates of both sexes." App. at 110.

The Attorney General did not concede, however, that even the adjustments which his expert suggested were required by the fourteenth amendment. Rather, he urged:

> Finally, the Special Master's constitutional findings are seemingly premised on stricter standards of inmate comfort than the minimum constitutional standard established by the United States Supreme Court. Careful scrutiny establishes that the jail conditions, while not ideal, are not in fact unconstitutional. As to the convicted inmates, no "pain" let alone "unnecessary or wanton pain" as inflicted. Discomfort or annoyance, yes; but pain, no. As to the detainees, conditions are not imposed to punish, but merely to secure the jail and manage the jail and accommodate it to the large population.

App. at 110.11.

Two things are significant about the Attorney General's Objections to the Master's Report. The first is that he urged that as a matter of law *no* remedy was required. The second is that he did not urge, as a remedy for any violation which might have occurred, the continuation or extension of the practice of double celling. *See* App. at 149-50.

At a later stage in the proceeding, after the court heard argument on the Objections to the Master's Report, the Attorney General stated his position on the double-celling practice. In a supplemental brief he urged that all of the conditions found by the Master to be violations of law could be alleviated by placing double bunks in the 218 general population cells. App. at 176. This would, of course, permit and increase in the potential population from 359 to at least 464 (436 in the general population cells and 28 in the "trustees/work release" dormitory). The alleviation would occur by virtue of the elimination of the two temporary dormitories housing 28 men and 8 women. The Attorney General's proposal, then was to permit the confinement of two adults in a space of 39 square feet between 10 p.m. and 6 a.m., relieved by access to the cellblock corridors, and by such recreation off the cellblock as could be provided in two restored recreation areas designed for a prison population of 218. The proposal did not suggest how other deprivations, which the Master found to be the result of overcrowding, could be alleviated by an increase in population.

III.

The District Court's Ruling

The district court reviewed the Master's findings of fact in accordance with the standard specified in Rule 53(e) (2) and concluded:

> I have determined that none of the proposed findings of fact are clearly erroneous, and I shall therefore adopt them without modification.

Union County, supra, 537 F. Supp. at 1001. Addressing the Attorney General's contention that even with double bunking no constitutional violation occurred, the court observed:

> The stark reality is that, whether provided with bare mattresses or mattresses placed on a frame, when the 39 square feet general population cells are shared by two persons, each person has 19.5 square feet of space inclusive of furniture and fixtures for the period of lock-up at night. Double-bunking in the UCJ is therefore roughly equivalent to quadruple-bunking in the MCC at issue in *(Bell v) Wolfish* 441 U.S. 520 (1979)). Such spatial starvation cannot pass muster constitutionally. Even the incarcerated are entitled to something more than a walk-in closet.
>
> Furthermore, there is no relief during the day from the adverse effects of overcrowding. As the Special Master found:
> The cell corridors and dormitories where the inmates spend the overwhelming majority of their waking hours are cramped, overcrowded and would allow little opportunity for free movement or exercise even at normal population levels. The pretrail detainees currently housed in general population cells or dormitories at the UCJ can do little more than watch television from 6:00 a.m. in the morning to 10:00 p.m. at night.
>
> SMR, at 22. If I assume that only half of the cells on any one tier are to be double-bunked under the Commissioner's proposed

remedy,[17] the average corridor space per person for daytime use will be between 15 and 21 square feet. Added to one person's share of the space of a double-bunked cell, a pretrial detainee at the UCJ is restricted nearly twenty-four hours a day to an area which the Court in *Wolfish* rules was barely sufficient for sleeping purposes. It falls far short of the 105 square feet governing new prison construction in this state. *N.J.A.C.* 10A:1-2.8(a) (4), (12).

Other courts have found jails with similar or more generous spatial dimensions than those in the UCJ unconstitutional. *See Lareau, supra; Campbell v. Cauthron*, 623 F.2d 503 (8th Cir. 1980); *Heitman v. Gabriel*, 524 F. Supp. 622 (W.D. Mo. 1981); *Vazquez, supra; Hutchings v. Corum*, 501 F. Supp. 1276 (W.D. Mo. 1980); *Benjamin v. Malcolm*, 495 F. Supp. 1357 (S.D.N.Y. 1980). Thus based soley on considerations of space, I find that double-celling or double-bunking at the UCJ subjects pretrial detainees to genuine hardships amounting to punishment in violation of the Fourteenth Amendment.

My decision does not rest upon an incorporation into the Due Process Clause of the

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17. This premise is reasonable when based on a population at the UCJ of at least 359 because, assuming I order the elimination of the temporary dormitories and I restrict the detention cells to no more than double occupancy as recommended by the Special Master, 115 out of the 218 general population cells would have to be double-celled. On the day the Special Master toured the UCJ, three tiers were totally double-celled, restricting these inmates to less than 15 square feet of corridor space.

various correction associations' recommendations with respect to the number of square feet appropriate for daytime space in a jail such as that contained in *N.J.A.C.* 10A:31-2.8(a). See *Wolfish, supra*, 441 U.S. at 543-44 n. 27, 99 S. Ct. at 1876-77 n.27. However, the 30 to 40 square feet allotted to a doublebunked detainee is grossly inadequate in comparison to any of these professional standards.[18]

Furthermore, overcrowded cells cannot be examined for constitutionality in isolation from the overall circumstances in the facility. *Wolfish, supra*, 441 U.S. at 525, 99 S. Ct. at 1866. In MCC, the hardships, if any, which are imposed upon pretrial detainees by double-bunking are mitigated by the unlimited daytime access to the large common areas. In UCJ, the more serious privations are aggravated by the overcrowded corridors, and the lack of meaningful recreation and other necessities. (For the female inmates, there is a lack of any recreation.) What the Second Circuit stated in *Lareau* with respect to the detention facility in Hartford, Connecticut, is applicable here: "(T)here is no real respite for the double-bunked inmate from the pressures of overcrowding," 651 F.2d at 101.

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18. For a summary of the recommendations of various commissions, courts and professional organizations, see 3 National Institute of Justice, American Prisons and Jails 2-7 (1980). The recommendations range from 50 to 80 square feet per inmate. Approximately 88% of local jails, according to the National Jail Census, have at least 40 square feet of floor space. 1 National Institute of Justice, American Prisons and Jails 83 (1980).

Union County, supra, 537 F. Supp. at 1005-06 & nn. 17-18.

Addressing the Attorney General's contention that by double-bunking the general detention cells the temporary dormitories could be eliminated, and the dormitory space restored to recreation uses, the court observed:

> The Commissioner proposes that elimination of the temporary dormitories for the men and women in conjunction with the establishment of a double-bunking practice would remedy any unconstitutional condition at the UCJ. I find this proposal to be unsatisfactory. It is doubtful that recreation will improve so long as the population is as high as it has been for several months even if the size of the recreation room is returned to its normal dimensions. The third-party defendant, in effect, is proposing a trade-off of one "genuine privation" for another. Either the pretrial detainees suffer increased crowding in the cells in order to enjoy slightly improved recreation opportunity or they suffer with the present recreation situation in order to enjoy slightly less crowded cells.[20]
>
> Nor is access to a crowded corridor an adequate substitution for real exercise and recreation. The Special Master found the corridors sufficient only for passive activities such as watching television.

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20. The impact of double-celling has been greatest on the pretrial detainees. Of the 162 inmates subject to double-celling on February 24, 1982, 142 were pretrial detainees. SMR at 8 n. 6. This degree of double-celling occurred even though there has been established at the UCJ two temporary dormitories in the former recreation spaces. Recreation and housing in the UCJ are flip sides of the same coin.

Union County, supra, 537 F. Supp. at 1006.

The court also addressed the effect that the double-bunking proposal would have on visitation privileges, noting:

> The overcrowding condition of the UCJ is the cause not only of inadequate recreation but also, as found by the Special Master, of reduced visitation privileges. This, too, aggravates the tensions already present because of double-bunking. As testified to by Assistant Commissioner Hilton, visitation has a very significant impact on the mental well-being of an incarcerated person.[21] Under the present circumstances, visits have been limited to five to ten minutes, if not indirectly discouraged altogether.[22]
> *Id.*

Looking at the totality of circumstances, the court concluded:

> *I have determined that double-bunking at the UCJ violates the due process rights of pretrial detainees. It constitutes "confining a given number of people in a given amount of space in such a manner as to cause them to endure genuine privations and hardships over an extended period of time." Wolfish, supra,* 441 U.S. at 542, 99 S.Ct. at 1875.

Union County, supra, 537 F. Supp. at 1007. Addressing the distinct problem of sentenced inmates in light of the same totality of circumstances, the Court concluded:

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22. For some friends and relatives, the prospect of a five-minute visit cannot justify the tranvel and waiting time. *See, e.g.*, Affidavits of Inmates Terrell and Thomas, SMR Appendix at A-91-96.

> Although the standard against which the court must judge conditions imposed upon sentenced offenders is more stringent than that which guides the analysis of the conditions of confinement of pretrial detainees, I find that the conditions at the UCJ are too egregious to satisfy either standard. Double-bunking, as practiced at the UCJ or as proposed, except in the detention/isolation cells, violates the Eighth Amendment as well as the Fourteenth Amendment.

Union County, supra, 537 F. Supp. at 1008-09.

It is plain that neither the master nor the district judge focussed on isolated phenomena at the Union County Jail as violations of the Constitution. Rather the violation found by both was the overall condition of overcrowding; the practice of confining human beings over long periods in space so small that they would inevitably suffer severe stress from lack of exercise, lack of variety in activity, too frequent intimate contact with fellow inmates, and too little contact with friends and counselors. The Court's declaratory judgment is explicit in this regard:

> ORDERED that the findings of fact of the Special Master be adopted and that the Union County Jail be declared unconstitutionally overcrowded.

Union County, supra, 537 F. Supp. at 1014.

In fashioning a remedy for the overall condition of overcrowding, the Court carefully weighed competing considerations. Since the overall condition of overcrowding was the constitutional violation which was found, the court addressed that problem directly by fixing the maximum capacity of the Union County Jail, until it is enlarged, at 259, with one

person in each general population cell and 26 persons in the "trustee/work release" dormitory. *Id.* at 1015 (Order of April 27, 1982, paragraph (g)). That Order conforms to the Master's finding that the Maximum Capacity of the facility was 244 as it stood, and 259 on completion of 15 new intake cells. Because New Jersey statutes provided that sentenced inmates should normally be removed to state penal institutions, while county jails are normally available for housing of pretrial detainees, the court ordered that sentenced prisoners be removed. *Union County, supra,* 537 F. Supp. at 1015.

Given the district court's finding that the overall condition of overcrowding was the constitutional violation, the central improvision of the judgment, fixing a maximum number of inmates, was tailored precisely to that violation. The time limit for accomplishing that relief was well within any rational limits of district court discretion in fashioning remedies. The decision to require removal of sentenced inmates was a reasonable accommodation between the competing demands upon the limited space of the Union County defendants for housing of pretrial detainees and of the state defendants for warehousing sentenced inmates.

IV.

The Panel Decision

On appeal the Attorney General reiterated the argument that even if every general population cell were double-bunked and filled there would be no constitutional violation of the rights of either the pretrial detainees or the sentenced inmates. The panel accepted this argument in toto, by vacating the central provision of the district court's remedial order, which fixed a maximum population for the Union County Jail. *Union County Jail Inmates v. Scanlon,* No.

82-5310, slip op. at 39-40 (3d Cir. Aug. 11, 1983). The effect of this Court's judgment is that there is no limit on overcrowding. The panel opinion endorses the position that each of the general population cells may be double-bunked, that the "trustees/work release" dormitory may be retained, and that the 15 new intake cells could be double bunked. See *Id.* at 26. The vacation of the Order fixing a maximum, with a clear indication that double bunking would be permitted in the general population cells and the fifteen new intake cells, suggests that on remand the district court must tolerate, in a facility designed for the temporary short term custody of 233 persons (218 general population cells and 15 new intake cells), a population as high as 494 inmates. At that population, or anything even nearly approaching it, the spatial constraints on the inmates will be, in proportion to size, and considering differences between men and beasts, far more severe than federal law tolerates for animals under that statutes and regulations governing their custody. *See* 9 C.F.R. §§ 3.128, 3.78(b) (1983).

In arriving at so fundamentally inhumane a result, morever, the panel completely ignored the limits of their reviewing authority imposed by Rules 52 and 53. Freely substituting their own factfinding for that of the Master, the panel members simply rewrote the facts to make it seem that the conditions in the Union County Jail are other than as found by the Master and the district court. Examples follow.

The Master found that "(t)he cell corridors ... where the inmates spend the overwhelming majority of their waking hours are cramped, overcrowded and would allow little opportunity for free movement or exercise even at normal population levels."
App. at 84. The panel, which unlike the Master, did not observe the facility first hand, finds that a cellblock corridor, even when the cells are fully double-bunked, "does provide adequate space for such exercises as push-ups, sit-ups, and even walking." Union County, supra, slip op. at 35 n.29. Imagine, if you can, the degree of social cooperation which

would be required for the suggested exercised when 24 persons occupy a space measuring 60 feet x 5.5 feet! Compare the requirement that "(e)ach nonhuman primate housed in a primary enclosure shall be provided with a minimum floor space equal to an area of at least three times the area occupied by such primate when standing on four feet." 9 C.F.R. § 3.78(b) (2) (1983).

The panel relies upon the "promised daily hour of recreation" as a factor mitigating the inevitable tensions resulting from 23 hours in the cramped conditions of the cellblock. The district court found, however, that "(i)t is doubtful that recreation will improve so long as the population is as high as it has been for several months even if the size of the recreation room is returned to its normal dimensions." *Union County, supra*, 537 F. Supp. at 1006. There is no finding by the Master or the district court supporting the panel's speculation that the restored recreation rooms will suffice to provide even one hour off the cellblock in 24. There is no record support for that speculation. The record establishes that the recreation rooms were built for a population of 244, not 494. *See* App. at 90. Even if operated around the clock they are not likely to provide significant alleviation from the tension generated by 23 hours a day cheek to jowl in the cellblocks; that, entirely aside from the logistical problem of moving so many persons through the antiquated facility.

The panel concluded that despite an increase in population, clean clothing would be provided. *Union County supra*, slip op. at 23. In so finding, the panel rejected a specific finding by the Master that "(w)hile jail officials stated that they have made every effort to comply substantially with this regulation (requiring a change of clothing at least once a week and clean towels daily), I am persuaded by the several affidavits submitted to me by the inmates that there has not been complete compliance ... I find that the County's inability to comply with this important regulation is entirely attributable to overcrowding conditions." App. at 76. No

record evidence supports the panel's illogical speculative finding that if the overcrowding is increased the county's ability to comply will increase rather than decrease.

The panel finds that the effects of overcrowding on the cellblocks would be "mitigated" by "promised visitation." *Union County, supra*, slip. op. at 26 n. 17. The Master found that:

> As a result of the sheer volume of visitors arriving at the UCJ on visitation days, the County has been forced to limit the time for each visit to a maximum of five to ten minutes. Even with this shortening of visitation time, jail officials are not always able to accommodate the large numbers of visitors.

App. at 76. One may search the record in vain for a shred of evidence that with an increased population the County jail officials will be better able to accommodate the larger number of visitors.

In an effort to minimize the appearance of harshness in its procrustean decree the panel attempts its own analysis of duration of confinement of pretrial detainees. *Union County, supra*, slip op. at 26-27 & n. 18. In doing so, however, it selects, not the list of inmates dated February 15, 1982 which was considered by the Master and the district court in making their findings, but a list dated a month earlier which, not suprisingly, produced a lower percentage of pretrial detainees confined at the Union County Jail for over 60 days.

Even with respect to the highest recorded inmate population, the panel made a finding of 385, *Union County, supra*, slip op. at 22-23 n. 14, whereas the district court correctly found that on April 19, 1982 the jail population had reached 392 inmates. *Union County, supra*, 537 F. Supp. at 999.

Finally, and inexplicably, the panel simply ignores findings by the Master and the district court that instances of fighting amongst the inmates have increased due to the overcrowded conditions at UCJ. App. at 77; *Union County, supra*, 537 F. Supp. at 1000. Apparently the inevitable propensity for

violence resulting from confining human beings in excessively close proximity to each other over long periods without relief is not deemed relevant in the panel's constitutional calculus.

As the law announced in the panel opinion, I will say no more than that *Bell v. Wolfish*, 441 U.S. 520 (1979), on which it principally relies, lends no support for the proposition that human beings can lawfully be subjected by a state to the conditions of confinement found by the Master. The opinion of the district court correctly analyzes the caselaw. By disregarding the Master's findings, and fragmenting the case as if it did not involve an interrelated set of intolerable conditions, all resulting from overcrowding, the panel opinion has applied bits and pieces of language in *Bell v. Wolfish* in a manner the Supreme Court never intended. *See Lareau v. Manson*, 651 F.2d 96, 99-105 (3d Cir. 1981); *Lock v. Jenkins*, 641 F. 2d 488, 491-94 (7th Cir. 1981); *Jones v. Diamond*, 636 F.2d 1364, 1373-74, 1375-76 (5th Cir.) (in banc), *cert. dismissed sub nom. Ledbetter v. Jones*, 453 U.S. 950 (1981); *Campbell v. Cauthron*, 623 F.2d 503, 504-08 (8th Cir. 1980).

V.

Conclusion

A society whose laws provide for greater attention to the conditions of confinement of animals than for the conditions of confinement of human beings is pathological. In the name of our common humanity we dissent from the denial of rehearing.